(13)

No. 99-1792-CSX Title: Director of Revenue of Missouri, Petitioner
v.
CoBank ACB, as Successor to the National Bank for Cooperatives

Docketed:
May 11, 2000 Court: Supreme Court of Missouri

Entry	Date	Proceedings and Orders
	Apr 24 2000	Petition for writ of certiorari filed. (Response due June 10, 2000)
	Jun 2 2000	Brief of respondent CoBank ACB in opposition filed.
	Jun 5 2000	LODGING consisting of one set of briefs filed in NM Ct. of Appeals submitted by counsel for the respondent.
	Jun 6 2000	Reply brief of petitioner Director of Revenue of MO filed.
	Jun 6 2000	DISTRIBUTED for Conference of June 22, 2000
	Jun 9 2000	Brief amici curiae of Ohio, et al. filed.
	Jun 26 2000	Petition GRANTED. limited to the following question: "Does 12 U.S.C. Section 2134 authorize states to tax the income of the National Bank for Cooperatives, a federally chartered instrumentality of the United States?". SET FOR ARGUMENT November 28, 2000. **********
	Aug 1 2000	Order extending time to file brief of petitioner on the merits until August 25, 2000.
	Aug 23 2000	Brief amicus curiae of Multistate Tax Commission filed.
	Aug 24 2000	Brief amicus curiae of United States filed.
	Aug 24 2000	Brief amici curiae of Ohio, et al. filed.
	Aug 25 2000	Brief amicus curiae of American Bankers Association filed.
	Aug 25 2000	Joint appendix filed.
	Aug 25 2000	Brief of petitioner Director of Revenue of Missouri filed.
	Sep 19 2000	Order extending time to file respondent's brief on the merits to and including October 9, 2000.
	Sep 19 2000	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Oct 2 2000	Record filed.
	Oct 6 2000	Brief of respondent CoBank, ACB filed.
	Nov 2 2000	CIRCULATED.
	Nov 3 2000	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument DISTRIBUTED.
	Nov 6 2000	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Nov 9 2000	Reply brief of petitioner Director of Revenue of Missouri filed.
	Nov 16 2000	Lodging of respondent consisting of 21 copies of an Indiana Supreme Court decision DISTRIBUTED.
	Nov 28 2000	ARGUED.

Supreme Court, U.
FILED
(1) 991792 APR 24 2000
OFFICE OF THE CLERK

No. _____

In the
SUPREME COURT OF THE UNITED STATES

Director of Revenue,

Petitioner,

v.

CoBank ACB, as Successor to the National Bank for Cooperatives,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Missouri

---

PETITION FOR WRIT OF CERTIORARI

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri

JAMES R. LAYTON
Solicitor General
Counsel of Record
Jefferson City, MO 65102
(573) 751-3321
Counsel for Petitioner

62 pp

QUESTION PRESENTED

Whether Congress, by repealing a contingent exemption from state taxation that included immunity from state income taxes for a Farm Credit System institution, and enacting in lieu thereof a noncontingent exemption that did not include state income taxes, permitted that institution to avoid the specific effects of the statute and partake instead of inherent immunity.

PARTIES TO THE PROCEEDING

All of the parties to the proceeding are listed in the caption.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

INTRODUCTION AND STATEMENT 4

REASONS FOR GRANTING THE WRIT 11

I. The Missouri and New Mexico decisions conflict, holding that precisely the same federal statutory language grants tax immunity in one state but not in the other. 11

II. The Missouri and New Mexico courts arrive at their opposing conclusions by adopting conflicting readings of this Court's requirements for congressional waivers of tax immunity for federal instrumentalities. 14

III. Resolving the conflict is important to the nation's banking system and to Congress, which allocates burdens and benefits between the states and the federal

government and among the various classes of financial institutions. 15

CONCLUSION 19

APPENDIX 20

TABLE OF AUTHORITIES

CASES **Page**

Arkansas v. Farm Credit Services of Central Arkansas, *cert. denied* 2000 WL 305848 (Mar. 27, 2000) 13, 14

Barclay v. Farm Credit Services, 8 S.W. 3d 517 (Ark. 2000) 13

Colorado Springs PCA v. Farm Credit Admin., 967 F.2d 648 (D.C. Cir. 1992) 10

Department of Employment v. United States, 385 U.S. 355 (1966) 15

Director of Revenue v. Prod. Credit Ass'n of Southeastern Mo., 10 S.W.3d 142 (Mo. banc 2000) 1

Farm Credit Services of Central Ark. v. Arkansas, 520 U.S. 821 (1997) 13, 18

Farm Credit Services of Central Ark. v. Arkansas, 76 F.3d 961 (8th Cir. 1996), *reversed on other grounds* 520 U.S. 821 (1997) . . 4-5, 10, 13

Farm Credit Servs. of Mid-America, 705 N.E.2d 1092 (Ind. Tax Ct. 1999) 14

Farmers' Production Credit Ass'n of South Burlington v. Vermont, 481 A.2d 18 (Vt. 1984) 10

Liberty Nat'l Bank & Trust Co. v. Buscaglia, 235 N.E. 2d 101 (N.Y. Ct. App. 1967) 16

McCulloch v. Maryland, 17 U.S. 316 (4 Wheat.) (1819) 4, 14

Production Credit Ass'n of Eastern N.M. v. Taxation & Revenue Dept., No. 20078, 2000 WL 300857 (N.M. App. Feb. 1, 2000), *cert. denied*, No. 26,211 (N.M. March 13, 2000) 5

Standard Oil Co. of Calif. v. Johnson, 316 U.S. 481 (1942) 15

United States v. Boyd, 378 U.S. 39 (1964) 16

Zeiss v. Benham Production Credit Ass'n, 259 S.W.2d 299 (Tex. Civ. App. Waco 1953) 10

STATUTES

7 U.S.C. § 941(c) 17

7 U.S.C. § 1511 16

12 U.S.C. § 531 16

12 U.S.C. § 548 16

12 U.S.C. § 1433 16

12 U.S.C. § 1441a(g) 16

12 U.S.C. § 1452(e) 16

12 U.S.C. § 1464(b) 16

12 U.S.C. § 1723a 16-17

12 U.S.C. § 1749bb-20 17

12 U.S.C. § 1768 17

12 U.S.C. § 1795k 17

12 U.S.C. § 1825 17

12 U.S.C. § 2023 ..... 8, 16

12 U.S.C. § 2077 ..... 4, 5, 10-12

12 U.S.C. § 2098 ..... 7, 16

12 U.S.C. § 2134 ..... 2, 4, 5, 10-12

12 U.S.C. § 2277a-12 16

12 U.S.C. § 2278a-11 16

12 U.S.C. § 2278b-10 16

12 U.S.C. § 2290 17

12 U.S.C. § 3019 17

15 U.S.C. § 713a-5 17

15 U.S.C. § 78kk(e) 17

16 U.S.C. § 191 17

16 U.S.C. § 583j-2(e)(2) 17

16 U.S.C. § 8311 17

20 U.S.C. § 1087-2(b)(2) 17

28 U.S.C. § 1257 2

31 U.S.C. § 2124c(j) 17

42 U.S.C. § 8102(d) 17

49 U.S.C. § 24301(1)(k) 17

Pub. L. No. 64-157, § 26, 39 Stat. 380 (1916) 7

Pub. L. No. 64-158, § 4, 39 Stat. 360 (1916) 7

Pub. L. No. 67-503, § 210, 42 Stat. 1454 (1923) 8

Pub. L. No. 73-98, § 20, 48 Stat. 257 (1933) 8

Pub. L. No. 73-98, § 63, 48 Stat. at 267 (1933) 9

Pub. L. No. 99-205, § 205(e)(16), 99 Stat. 1678 (1985) ... 10

Rev. Stat. Mo. § 143.071 (1994) 2-3, 7

Rev. Stat. Mo. § 143.441 (1994) 3

OTHER AUTHORITIES

Farm Credit Act of 1933 8

In re Farm Credit of Western New York, January 13, 2000 (copy available at http://www.nysdta.org/816576.det.htm) 12

H.R. Rep. No. 425, 99th Cong., 1st Sess. 5 (1985), *reprinted in* 1985 U.S.C.C.A.N. 2587, 2591. ..... 7, 15

Panos Konstas, "Government-Sponsored Enterprises: Their Role as Conduits of Credit and as Competitors of Banking Institutions," FDIC Banking Review, Vol. 8 No. 2 (June 1995), available at http://www.fdic.gov/bank/analytical/banking/1995sprg/rbr01a02.html 18

S.Rep. No. 124, 73d Cong., 1st Sess. 2 (1933) 8

No. _____

In the
SUPREME COURT OF THE UNITED STATES

Director of Revenue,

Petitioner,

v.

CoBank ACB, as Successor to the National Bank for Cooperatives,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Missouri

---

PETITION FOR WRIT OF CERTIORARI

Petitioner Director of Revenue of the State of Missouri, currently Quentin Wilson, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Missouri.

OPINIONS BELOW

The opinion of the Supreme Court of Missouri (Appendix ("App.") A1-A-3), entered on January 25, 2000, is reported at 10 S.W.3d 142. The opinion covers two appeals,

one by three "production credit associations" (PCAs), and one by a "bank for cooperatives" (BFC), CoBank. The decision of Missouri's Administrative Hearing Commission (AHC) is not reported; it is printed at App. A4-A14.

JURISDICTION

The Supreme Court of Missouri entered its judgment on January 25, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

12 U.S.C. § 2134 (1988):

> Each bank for cooperatives and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such bank shall be exempt, both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territorial, or local taxing authority, except that interest on such obligations shall be subject to Federal income taxation in the hands of the holder.

Rev. Stat. Mo. § 143.071 (1994):

> 1. For all tax years beginning before September 1, 1993, a tax is hereby imposed upon the Missouri taxable income of corporations in an amount equal to five percent of Missouri taxable income.
>
> 2. For all tax years beginning on or after September 1, 1993, a tax is hereby imposed upon the Missouri taxable income of corporations in an amount equal to six and one-fourth percent of Missouri taxable income.

Rev. Stat. Mo. § 143.441 (1994) (in pertinent part):

> 1. The term "corporation" means every corporation, association, joint stock company and joint stock association organized, authorized or existing under the laws of this state and includes:
>
> (1) Every corporation, association, joint stock company, and joint stock association organized, authorized, or existing under the laws of this state, and every corporation, association, joint stock company, and joint stock association, licensed to do business in this state, or doing business in this state, and not organized, authorized, or existing under the laws of this state, or by any receiver in charge of the property of any such corporation, association, joint stock company or joint stock association;
>
> . . . .
>
> 2. The tax on corporations provided in subsection 1 of section 143.431 and section 143.071 shall not apply to:
>
> . . .
>
> (5) Any other corporation that is exempt from Missouri income taxation under the laws of Missouri or the laws of the United States.

INTRODUCTION AND STATEMENT

Since *McCulloch v. Maryland*, 17 U.S. 316 (4 Wheat.) (1819), this Court has, from time to time, struggled with the scope of immunity from state and local taxation for various persons or entities with ties to the government of the United States. The pace of such struggles accelerated in the latter half of the 20th century, as the scope of the government's activities grew, particularly in economic spheres.

This is one in a series of cases arising from state efforts to tax institutions that were created as part of the Farm Credit System. In this case, the object of taxation is a bank for cooperatives (BFCs). Congress first spoke of the immunity for such banks when it created them and production credit associations (PCAs) in 1933. Congress defined both BFCs and PCAs as "federal instrumentalities." And it defined the scope of their exemption from state and local taxes.

Pursuant to that statutory provision, by 1971 all of the BFCs, as well as the PCAs, paid state and local taxes. They did so pursuant to the 1933 language, which was eventually embodied in 12 U.S.C. §§ 2077 (for PCAs) and 2134 (for BFCs). In 1985, Congress enacted parallel amendments to those parallel statutes. The regulated institutions claimed below that by deleting language in the statutes that provided for a broad exemption, Congress provided such an exemption by returning the institutions from statutorily-regulated immunity to the inherent constitutional immunity of *McCulloch*.

Whether the language adopted in 1985 had that unannounced effect has been addressed in various forums. Only one U.S. Court of Appeals has considered it: the Eighth, whose sharply divided opinion was reversed on jurisdictional grounds. *Farm Credit Services of Central Ark. v. Arkansas*, 76

F.3d 961 (8th Cir. 1996), *reversed on other grounds* 520 U.S. 821 (1997). The division among the various state courts and administrative agencies that have addressed it is as stark as the division among the Eighth Circuit judges.

The immediate conflict is between Missouri and New Mexico. Both have recently considered the language now found in § 2077 and § 2134. On January 24, 2000, the Supreme Court of Missouri held that the 1985 change eliminated the states' ability to tax the pertinent Farm Credit institutions. App. A3. A week later, the New Mexico Court of Appeals held that under the same language, states can continue to tax them; the New Mexico Supreme Court denied certiorari. *Production Credit Ass'n of Eastern N.M. v. Taxation & Revenue Dept.*, No. 20078, 2000 WL 300857 (N.M. App. Feb. 1, 2000) (printed in the Appendix at A15), *cert. denied Production Credit Ass'n of Eastern N.M. v. Taxation & Revenue Dept.*, No. 26,211 (N.M. March 13, 2000).

These courts' divergent views are a function of how they interpret the standards set by this Court for Congress to meet in waiving the immunity of federal instrumentalities to state taxation. The Missouri court held that the standard requires that Congress enact language specifying just which taxes a state can impose. The New Mexico court held that when Congress expressly exempts a federal instrumentality from a limited set of taxes, Congress has waived that entity's immunity from other, unmentioned taxes.

These conflicting holdings have an obvious impact on the states and on the affected financial institutions. But the varying rationales have broader application. When creating and regulating federal instrumentalities, Congress is empowered to allocate the burdens of taxation and the benefits of revenue. But what standard must its language meet? And what statutes

must it now amend, if its intent with regard to the allocation of burdens and benefits is to be carried out? The conflicting answers given by the Missouri and New Mexico courts demand this Court's attention.

1. The administrative decision. This case began with a claim for refund of state income taxes filed by CoBank. CoBank, the only remaining BFC,[1] sought refunds of taxes paid to Missouri by one of its predecessors, National Bank for Cooperatives. CoBank and its predecessors provide credit and related services to farmers, ranchers, and producers or harvesters of aquacultural products, and to agricultural, aquaculture, and utility cooperatives. App. A7. BFCs have long been owned by borrowers. *Id.*

NBC filed Missouri corporate income tax returns and paid income tax for tax years 1991 through 1994. In March 1996, CoBank filed amended returns on behalf of NBC, seeking refunds of income tax paid for 1991 through 1994. The Missouri Director of Revenue denied those claims in pertinent part.[2]

---

[1] The National Bank for Cooperatives, which operated in Missouri, was formed by the mergers of many of the existing BFCs in 1989. CoBank was formed in 1995 from a consolidation of NBC with two other entities. In 1999 the sole remaining independent BFC also merged into CoBank.

[2] In March 1995, the Missouri Secretary of State assessed franchise taxes on CoBank for 1991 through 1994. Though mentioned in the Administrative Hearing Commission decision, the imposition of those taxes was not resolved and thus was not at issue before the Missouri Supreme Court. *See* App. A13.

In March 1998, CoBank filed a complaint in Missouri's Administrative Hearing Commission (AHC), challenging that decision. The AHC upheld the Director's denial. App. A13. For jurisdictional reasons, it did not reach the PCAs' constitutional claim. *Id.* CoBank appealed to the Missouri Supreme Court.

2. The Statutes. The Director imposed taxes on CoBank pursuant to Rev. Stat. Mo. § 143.071 (1994), Missouri's corporate income tax. CoBank did not argue that it was excluded by Missouri law. It relied, instead, on federal tax immunity.

BFCs, like PCAs, were among the group of institutions created by Congress and broadly described as the "Farm Credit System" -- a system that began with the creation of "federal land banks" in 1916. Pub. L. No. 64-158, § 4, 39 Stat. 360, 362 (1916). The various financial institutions in the Farm Credit System, like national banks, are tied to the federal government both by their federal charters and by the federal government's continuing regulation. *See* H.R. REP. NO. 425, 99th Cong., 1st Sess. 5 (1985), *reprinted in* 1985 U.S.C.C.A.N. 2587, 2591.

Congress gave the original land banks a broad exemption from taxation. The exemption applied to the banks themselves, to their assets, and to their income. Pub. L. No. 64-157, § 26, 39 Stat. 380. It remains in force today, largely unchanged. 12 U.S.C. § 2098 (1988). As to real property taxes, however, Congress from the beginning distinguished the land banks from federal agencies generally: federal agency lands were not subject to state and local property taxes; land bank-owned land was. *Id.*

Over the years, the Farm Credit System grew in size and scope. For example, Congress created "intermediate credit

banks" in 1923, retaining for them the same broad statutory tax exemption possessed by land banks since 1916. Pub. L. No. 67-503, § 210, 42 Stat. 1454, 1459 (1923). Congress streamlined the system in 1987 by merging the land banks and the intermediate credit banks. The statutory 1916 tax exemptions, with only slightly changed wording, still applied to the merged entities. *See* 12 U.S.C. § 2023.

The forms of financial institutions that were before the Missouri Supreme Court, PCAs and BFCs, were authorized by the Farm Credit Act of 1933. *See* Pub. L. No. 73-98, § 20, 48 Stat. 257, 259-60 (1933). PCAs and BFCs were initially capitalized and owned entirely by the federal government. Over the years, however, borrowers achieved what Congress had intended (S.REP. NO. 124, 73d Cong., 1st Sess. 2 (1933)): the government's stock was retired and ownership was vested entirely in private hands. *See* A7.

For the banks authorized in 1933, Congress departed from the broad immunity that it promised to the land banks. Instead, it set up a scheme under which the institutions would have such broad immunity only temporarily. So, while the United States remained a shareholder, these new institutions would pay property taxes, but be exempt from others:

> The Central Bank for Cooperatives, the Production Credit Corporations, Production Credit Associations, and Banks for Cooperatives, organized under this Act, and their obligations, shall be deemed to be instrumentalities of the United States, and as such, any and all notes, debentures, bonds, and other such obligations issued by such associations shall be exempt both as to principal and interest from all taxation ... imposed by the

> United States or by any State, Territorial, or local taxing authority. Such associations, their property, their franchises, capital, reserves, surplus, and other funds, and their income, shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that any real property and any tangible personal property ... shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed. The exemption provided herein shall not apply with respect to . . . any . . . Bank for Cooperatives, or its property or income after the stock held in it by the [United States] has been retired.

Pub. L. No. 73-98, § 63, 48 Stat. at 267 (emphasis added). Thus the law declared that BFCs and their financial instruments are "federal instrumentalities." And it them gave a list of exemptions from tax: first for financial instruments; then for property, franchises, capital, reserves, surplus, other funds, and income. But it qualified that second, broad exemption in two ways. First, it excluded from the exemption property taxes, thus permitting states and local governments to continue receiving such taxes though the property may be foreclosed or otherwise acquired by the BFC. Second, it made the remaining exemption contingent on the United States still owning shares in the institution.

The federal government, then, temporarily lent its credit and resources to make each BFC viable. During the period of that loan, Congress made states and local governments share the burden by precluding them from imposing taxes on that BFC, other than property taxes. But state and local governments had paid their share once the government's stock was retired. Thus

long before this case was brought, the BFCs, like the PCAs, retired their federal shares, lost the contingent exemption, and paid state and local taxes (except for taxes on their financial instruments). *See Farm Credit Services of Central Ark. v. Arkansas*, 76 F.3d 961 at 966 (Loken, J. dissenting), and cases cited therein; *Zeiss v. Benham Production Credit Ass'n*, 259 S.W.2d 299, 301-02 (Tex. Civ. App. Waco 1953); *Farmers' Production Credit Ass'n of South Burlington v. Vermont*, 481 A.2d 18 (Vt. 1984).

Just as the savings and loan crisis prompted reform of the federal deposit insurance program, a crisis in American agriculture persuaded Congress to restructure the farm credit system in 1985. *See generally Colorado Springs PCA v. Farm Credit Admin.*, 967 F.2d 648, 650-52 (D.C. Cir.1992). That restructuring eliminated the position of "Governor" of the Farm Credit System. Because the title "Governor" was used in the last sentence of the now separate, but still identical PCA and BFC tax exemption statutes (the "sunset" clause), the restructuring required amendment. Thus Congress eliminated the "sunset" clause and the language creating the broad, contingent exemption -- on which, by that time, the sun had set because the government's stock had been retired. *See* Pub. L. No. 99-205, § 205(e)(16), 99 Stat. 1678, 1705 (1985).

What remained, with minor subsequent changes, were the tax exemptions now codified at 12 U.S.C. §§ 2077 and 2134. There Congress, having deleted the broad exemptions in the original statutes, preserved the tax-exempt status only of investment vehicles issued by PCAs and BFCs:

> Each [institution] and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such associations shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territory, or local taxing authority, except that interest on such obligations shall be subject to Federal income taxation in the hands of the holder.

12 U.S.C. §§ 2077 and 2134.

3. Decision of the Missouri Supreme Court. The Missouri Supreme Court went directly to the question that the AHC lacked jurisdiction to decide: whether the PCAs and CoBank, as federal instrumentalities, are immune from state and local taxation. Or stated in the converse, did Congress, in enacting the limited exemptions now found in §§ 2077 and 2134, waive the PCAs' and BFCs' immunity to other state and local taxes? The court held that it did not. App. A3.

REASONS FOR GRANTING THE WRIT

I. The Missouri and New Mexico decisions conflict, holding that precisely the same federal statutory language grants tax immunity in one state but not in the other.

Before the Missouri court were claims of immunity from Missouri's corporate income tax brought by two types of institutions within the Farm Credit System. The first type was "production credit associations" (PCAs), which pointed to 12 U.S.C. § 2077 to dictate their liability for or exemption from state and local taxes.[3] The second type was the "bank for

[3] Because of an agreement reached with the Missouri production credit associations in another case, the Director of

cooperatives" (BFCs), which pointed to identical language in 12 U.S.C. § 2134. The Missouri Supreme Court held that BFCs and PCAs are federal instrumentalities, and that the language found in §§ 2077 and 2134 does not constitute a waiver that permits state and local taxation.

Before the New Mexico Court of Appeals was a claim of immunity from New Mexico's corporate income and franchise taxes, brought by a PCA and thus invoking from § 2077 the identical language applied by the Missouri court from both § 2077 and § 2134. The New Mexico Court of Appeals held that PCAs, despite being federal instrumentalities, are subject to state and local taxation because that language constitutes a valid waiver of their immunity.[4]

There is no way to reconcile these holdings.

The result? A PCA operating in New Mexico looks to §2077, but must still pay state and local taxes. A BFC operating in Missouri looks to the same language in § 2134 and finds immunity. Those differences, which arise purely from interpretation of federal and not state law, merit this Court's attention.

This is not the first time the question of the impact of this statutory language has been presented to this Court for review. It has twice come in a case from Arkansas. Most

---

Revenue is not seeking certiorari as to the refund claims made by those entities.

[4] The New York Division of Tax Appeals has recently reached that same conclusion. *In re Farm Credit of Western New York*, January 13, 2000 (copy available at http://www.nysdta.org/816576.det.htm).

recently, this Court denied a petition for writ of certiorari in *Arkansas v. Farm Credit Services of Central Arkansas*, No. 99-993, *cert. denied* No. 99-993, 2000 WL 305848 (Mar. 27, 2000), though only after questioning whether the Arkansas Department of Revenue had authority to file the petition (*see Barclay v. Farm Credit Services*, 8 S.W. 3d 517 (Ark. 2000)). But this Court had granted certiorari in a prior version of essentially the same case, on the same question. *Farm Credit Services of Central Ark. v. Arkansas*, 520 U.S. 821 (1997).[5] The Court did so after hearing from the Solicitor General, who supported the petition and who later supported Arkansas' position on the issue presented here. The Court also, however, followed the urging of the Solicitor General and decided the case on jurisdictional grounds under the Tax Injunction Act. *See id.* and Brief of the United States (on petition for writ of certiorari and on the merits), No. 95-1918 at 7; Brief of the United States (on the merits), No. 95-1918 at 23, 1997 WL 86301.

Unlike the Arkansas case, this case involves problems with neither authority to petition nor lower court jurisdiction. Though the New Mexico decision was apparently identified to the Court during consideration of the second Arkansas petition through post-petition letters, its effect was not briefed. The direct conflict between that decision and the decision of the Supreme Court of Missouri firmly establishes the importance of the issue.

---

[5] In that case, the only one in which a federal appellate court has addressed the precise question at issue here, the court split. *See Farm Credit Services of Central Ark. v. Arkansas*, 76 F.3d 961 at 966 (Loken, J. dissenting). This Court's decision in that case merely ensured that future litigation will take place in the states.

II. The Missouri and New Mexico courts arrive at their opposing conclusions by adopting conflicting readings of this Court's requirements for congressional waivers of tax immunity for federal instrumentalities.

This case presents a fundamental question of federal law. It arises from doctrines going back to *McCulloch*. The question is not, however, one of whether a federal instrumentality is normally exempt from state and local tax. Nor is it whether the Farm Credit System's financial institutions are "federal instrumentalities," normally entitled to tax immunity. The question addresses only the manner in which Congress can waive that immunity.

As the New Mexico court observed, the Missouri Supreme Court and others that ruled with it, "without exception, based their decisions on the well-settled rule that federal instrumentalities retain their inherent immunity from state taxation in the face of Congressional silence." 2000 WL 300857 *8, *citing Arkansas v. Farm Credit Servs.*, 994 S.W. 2d 453; and *Farm Credit Servs. of Mid-America*, 705 N.E.2d 1092 (Ind. Tax Ct. 1999). The New Mexico court recognized that the specific *language* in the current version of the pertinent waiver provision is silent as to immunity, except for taxes on financial instruments. But that did not mean, in that court's view, that *Congress* was silent.

The New Mexico court found that Congress had spoken by word and action. It began by reviewing the changes enacted in the statute over the years. It also considered the written legislative history. It concluded that Congress's intent in 1985 was clear: to eliminate the tax exemption that had fallen into disuse, and to continue only a very limited exemption for the institutions' instruments and obligations. The court observed

that the contrary view requires a conclusion that Congress made a dramatic change in the Farm Credit institutions' tax liability without announcement, through an amendment that Congress described as "'technical and conforming.'" 2000 WL 300857 at *7 (A27), *quoting* H.R. REP. NO. 425 at 28-29, 1985 U.S.C.C.A.N. at 2615. According to the New Mexico court, that history defeats the premise that Congress was "silent."

Contrary to the conclusion of the Missouri coûrt, this case is not about Congressional silence. It is about the meaning of what Congress said -- or about how Congress must say what immunity it permits for a privately-owned entity that it creates. The New Mexico and Missouri courts answered that question differently because they traveled on different paths. Like the PCAs, CoBank operates in all 50 states. Thus all the states will have to chose between the paths that Missouri and New Mexico traveled. As they make different choices, they will necessarily reach different results. Owners of financial institutions and state taxpayers will benefit or suffer, depending on those results. This court should mark the correct path and eliminate that inconsistency.

III. Resolving the conflict is important to the nation's banking system and to Congress, which allocates burdens and benefits between the states and the federal government and among the various classes of financial institutions.

"Federal instrumentalities" come in a wide variety of forms, from the Red Cross (*see Department of Employment v. United States*, 385 U.S. 355 (1966)), to the U.S. Army Post Exchanges (*see Standard Oil Co. of Calif. v. Johnson*, 316 U.S. 481, 483-85 (1942)). For some types of federal instrumentalities, Congress has chosen to never give or to

completely repeal waiver statutes, leaving them to be taxed only within constitutionally-established limits. *See United States v. Boyd*, 378 U.S. 39, 51 & n. 10 (1964). For others, Congress has chosen to allocate by statute the burdens and benefits among federal, state, and local governments by defining the extent to which those entities will be subject to or exempt from state and local taxation.

Congress has consistently taken the latter course with regard to federally-chartered financial institutions. The nature of local tax liability for such institutions varies from near-complete immunity[6] to nothing more than the states themselves give.[7] Congress has included some common elements in those statutes. The most consistent example is a specific provision permitting state and local property taxes, like the one found in the former, contingent exemption for PCAs and BFCS. Such permission is found in the statutes that regulate other institutions in the Farm Credit system,[8] as well as in statutes regulating the wide range of other federally-chartered financial institutions.[9] By contrast, in other instances Congress

---

[6] *See* 7 U.S.C. § 1511 (Fed. Crop Ins. Corp.)

[7] *See* 12 U.S.C. § 548 (national banks). *See also Liberty Nat'l Bank & Trust Co. v. Buscaglia*, 235 N.E. 2d 101 (N.Y. Ct. App. 1967).

[8] *See, e.g.*, 12 U.S.C. § 2023 (farm credit banks); 12 U.S.C. § 2098 (land banks); 12 U.S.C. § 2278a-11 (Assistance Board); 12 U.S.C. § 2277a-12 (Farm Credit System Insurance Corp.); 12 U.S.C. § 2278b-10 (Financial Assistance Corp.).

[9] *E.g.*, 12 U.S.C. § 531 (federal reserve banks); 12 U.S.C. § 1433 (federal home loan banks); 12 U.S.C. § 1441a(g) (Resolution Trust Corp.); 12 U.S.C. § 1452(e) (Federal Home Loan Mortgage Corp.); 12 U.S.C. § 1464(b) (federal savings associations); 12 U.S.C. § 1723a (Government Nat'l Mortgage Ass'n and Federal National Mortgage Ass'n); 12 U.S.C. § 1749bb-20 (National Insurance Development Fund); 12 U.S.C. § 1768 (federal credit unions); 12 U.S.C. § 1795k (Central Liquidity Facility); 12 U.S.C. § 1825 (Federal Deposit Ins. Corp.); 12 U.S.C. § 2290 (Federal Financing Bank); 12 U.S.C. § 3019 (Nat'l Consumer Cooperative Bank); 15 U.S.C. § 713a-5 (Commodity Credit Corporation); 15 U.S.C. § 78kk(e) (Securities Investor Protection Corp.); 20 U.S.C. § 1087-2(b)(2) (Student Loan Marketing Ass'n); 42 U.S.C. § 8102(d) (Neighborhood Reinvestment Corp.).

has expressly exempted federal instrumentalities from property taxes.[10] The careful determination of when federal institutions that acquire property must pay taxes that would be due from private owners is just one example of the ways in which Congress has assigned the burdens of state taxation to individual categories of federal instrumentalities.

The decision of the Missouri Supreme Court threatens that allocation. Relying on Congressional "silence," it exempts entirely from state and local taxation just two among the myriad types of financial institutions. In essence, it declares that Congress, by its failure to include exact language in a "technical and conforming" amendment, shifted PCAs and BFCs all the way from the "pay all state and local taxes," past the "pay property taxes," to the "pay no taxes" category. It thus deprives

---

[10] *See, e.g.*, 16 U.S.C. § 191 (National Park Foundation); 16 U.S.C. § 583j-2(e)(2) (National Forest Foundation); 31 U.S.C. 2124c(j) (Rural Tourism Development Foundation). *See also* 49 U.S.C. § 24301(1)(k) (partial and conditional exemption for Amtrak). Congress' concern for preserving the ability of states to obtain revenue is so great that in some instances where the federal instrumentality remains exempt from property tax, Congress has authorized payments in lieu of taxes. *E.g.*, 7 U.S.C. § 941(c) (Rural Telephone Bank); 16 U.S.C. § 8311 (Tenn. Valley Auth.).

state and local governments of needed revenue. And it suddenly alters the balance between competing financial institutions.[11]

Perhaps the Missouri Supreme Court is right, and the rule is that Congress expands the tax exemption enjoyed by a species of federal instrumentality merely by replacing a broad exemption with a narrower one. But if so, financial institutions and other federal instrumentalities, the states, and Congress need to know. This Court's decision in *Farm Credit Services of Central Ark. v. Arkansas* ensures that the answer will not come from the lower federal courts. The conflict evident here shows that the fifty states will not give consistent answers.

---

[11] For a recent discussion of the relative positions of Farm Credit System and other financial institutions, *see* Panos Konstas, "Government-Sponsored Enterprises: Their Role as Conduits of Credit and as Competitors of Banking Institutions," FDIC Banking Review, Vol. 8 No. 2 (June 1995), available at http://www.fdic.gov/bank/analytical/banking/ 1995sprg/ rbr01a02. html.

CONCLUSION

For the reasons stated above, the Court should grant the petition and resolve the conflict as to whether Congress, merely by replacing a broad tax exemption with a narrow one, expands the scope of a federal instrumentality's tax immunity.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

James R. Layton
State Solicitor
Counsel of Record
P.O. Box 899
Jefferson City, MO 65102
(573) 751-3321

Counsel for Petitioner

APPENDIX

APPENDIX INDEX

Decision of the Missouri Supreme Court A-1

Decision of the Administrative Hearing Commission ... A-5

Decision of the New Mexico Court of Appeals A-17

Opinion
Supreme Court of Missouri

Production Credit Association of Southeastern Missouri, et al., Appellants, v. Director of Revenue, Respondent. CoBank, ACB, as Successor to The National Bank for Cooperatives, Appellant, v. Director of Revenue, State of Missouri, Respondent.

SC81407 and SC81727
01/25/2000

Stephen N. Limbaugh, Jr., Judge

This is a consolidated case in which several member institutions of the Farm Credit System seek review of the decisions of the Administrative Hearing Commission (AHC) upholding the Director of Revenue's (Director) assessment of corporate income tax. Appellants claim that their status as federal instrumentalities exempts them from corporate income tax unless Congress expressly consents to the tax, and that Congress has not given that consent. Because appellants challenge the constitutional validity of section 143.071, RSMo 1994, the statute imposing the tax, this Court has exclusive jurisdiction. Mo. Const. art. V, sec. 3. The decisions of the AHC are reversed, and the cases are remanded.

Appellants in both cases -- Production Credit Association of Southeast Missouri, Farm Credit Services of Western Missouri, Farm Credit Services of Eastern Missouri, and CoBank, ACB (successor in interest to National Bank for Cooperatives) -- are part of the Farm Credit System created by Congress and chartered by the Farm Credit Administration in accordance with the Farm Credit Act of 1971. 12 U.S.C. sec. 2001, *et seq*. The appellants are farmer owned, agricultural, cooperative

organizations whose only business is to assist farmers in obtaining adequate and reliable credit at the lowest possible cost. They have been designated as "federally chartered instrumentalities of the United States." 12 U.S.C. sections 2071, 2141.

Appellants filed Missouri corporate income tax returns for the years 1991 through 1994 and paid the taxes shown on those returns. Thereafter, they filed amended returns requesting an exemption from all state taxes and refunds of the taxes erroneously paid. The Director then issued a "final decision" refusing the requests. On appeal, the AHC denied relief because it had no jurisdiction to address constitutional claims, *State Tax Comm'n v. Administrative Hearing Comm'n*, 641 S.W.2d 69, 75-76 (Mo. banc 1982), and, in particular, the validity of the corporate income tax as applied to the appellants. On appeal to this Court, the two cases have been consolidated.

According to the rationale first expressed in *McCulloch v. Maryland*, 17 U.S. 316, 436-37 (4 Wheat.) (1819), the Supremacy Clause of the United States Constitution accords federal instrumentalities immunity from state taxation. *United States v. State Tax Comm'n of Miss.*, 421 U.S. 599, 605 (1975); *First Agric. Nat'l Bank of Berkshire v. State Tax Comm'n*, 392 U.S. 339, 340 (1968); *Department of Employment v. United States*, 385 U.S. 355, 358 (1966); *United States v. Allegheny County*, 322 U.S. 174, 177 (1944). The Supreme Court has explained, however, that Congress can waive this immunity, but only if it expressly consents to state taxation. *Allegheny County*, 322 U.S. at 177. *See also Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 122 (1954) ("this Court cannot subject the Government or its official agencies to state taxation without a clear congressional mandate."). The Director does not dispute that appellants are federal instrumentalities or that Congress must give express authorization to state taxation. Instead, he

argues that Congress' consent is clear when the current version of the Farm Credit Act, which is silent on the issue, is compared with the previous version, Farm Credit Act of 1971, Pub. L. No. 92-181, sections 2.17, 3.13, 85 stat. 583, 602, 608 (1971), which, until amended in 1985, expressly exempted member institutions from state income tax. As the Director explains, by deleting the exemption from state income tax, Congress necessarily intended to consent to the imposition of state income tax.

The Director's argument is unpersuasive. Congressional consent, under the Director's theory, is not express, but is merely implied, and the absence of express consent is sufficient under the Supreme Court precedents to rebut the Director's claim. Furthermore, because the current version of the statute is silent on the matter, Congress' position is unclear, at best. Under these circumstances, Congress cannot be said to have expressly consented to state income tax.

Accordingly, this Court holds, as have the other courts that have addressed the issue of state taxation of member institutions of the Farm Credit System, that appellants are exempt from state income taxation. *See Farm Credit Serv. of Cent. Ark. v. Arkansas*, 76 F.3d 961, 964 (8th Cir. 1996), *rev'd on other grounds*, 520 U.S. 821 (1997); *State v. Farm Credit Serv. of Cent. Ark.*, 994 S.W.2d 453, 456 (Ark. 1999), *petition for cert. filed*, 68 U.S.L.W. 3401 (Sept. 28, 1999) (No. 99-993); *Farm Credit Serv. of Mid-America v. Department of State Revenue*, 705 N.E.2d 1089, 1092 (Ind. Tax Ct. 1999); *Northwest La. Prod. Credit Ass'n v. State*, 98 CA 1995, 1999 WL 1000995 (La. Ct. App. Nov. 5, 1999).

Having determined that the appellants are exempt from state income taxes, they are entitled to refunds on the taxes paid. The decisions of the AHC upholding the imposition of state income

taxes are reversed, and the cases are remanded.

All concur.

Before the
Administrative Hearing Commission
State of Missouri

COBANK, ACB, AS SUCCESSOR TO THE NATIONAL BANK FOR COOPERATIVES,	)	
Petitioner,	)	
vs.	)	Nos. 98-0716 & 98-0718 RI
DIRECTOR OF REVENUE,	)	
Respondent.	)	

COBANK, ACB, AS SUCCESSOR TO THE NATIONAL BANK FOR COOPERATIVES,	)	
Petitioner,	)	
vs.	)	No. 95-2048 SS
SECRETARY OF STATE OF THE STATE OF MISSOURI,	)	
Respondent.	)	

MEMORANDUM AND ORDER

On March 13, 1998, Cobank, ACB, as successor to the National Bank for Cooperatives (NBC), filed a complaint challenging the Director of Revenue's February 20, 1998, final decision denying NBC's claim for a refund of Missouri corporate income taxes for 1991 through 1993. We assigned case No. 98-0718 RI to that case. On March 13, 1998, Cobank also filed a complaint challenging the Director of Revenue's February 20, 1998, final decision denying in part NBC's claim for a refund of Missouri corporate income tax for 1994. We assigned case No. 98-0716 RI to that case.

On August 23, 1995, Cobank, as successor to NBC, filed a complaint challenging the Missouri Secretary of State's July 26, 1995, decision denying NBC's protest of the Secretary's franchise tax assessment against NBC for 1991 through 1994. We assigned case No. 95-2048 SS to that case. Cobank raised three issues: (1) whether NBC was immune from state taxation; (2) whether NBC was subject to franchise tax under Chapter 147, RSMo; and (3) whether a retroactive change in policy by the Secretary was unconstitutional. On August 7, 1996, we issued an order granting Cobank's motion to hold that case in abeyance pending the United States Supreme Court's ruling on the State of Arkansas' petition for writ of certiorari in ***Farm Credit Servs. of Central Arkansas, PCA v. State of Arkansas***, 76 F.3d 961 (8th Cir. 1996).

In all three cases, Cobank claims that NBC was a federal instrumentality and therefore was not subject to taxation by the State of Missouri.

On September 23, 1998, we held a pre-hearing conference in Case Nos. 98-0716 RI and 98-0718 RI. At the conference, Cobank and the Director agreed to a schedule for

Cobank to file a motion for summary determination and for the Director to file a response.

On October 7, 1998, we ordered the parties in case No. 95-2048 SS to show cause why the case should not be taken out of abeyance and set for hearing. On November 5, 1998, the Secretary filed a response, requesting that case No. 95-2048 SS be consolidated with the income tax cases for purposes of determining whether Cobank is immune from state taxation, and requesting that the Secretary be included in the schedule allowing a response to the motion for summary determination that Cobank would file.

On November 19, 1998, Cobank filed its motion for summary determination in Case Nos. 98-0716 RI and 98-0718 RI, arguing that it is exempt from taxation by the State of Missouri.

On November 19, 1998, we issued an order consolidating the two income tax cases, removing case No. 95-2048 SS from abeyance status, consolidating the franchise tax with the income tax cases only for purposes of determining whether NBC was immune from taxation by the State of Missouri, and revising the briefing schedule on Cobank's motion for summary determination. Therefore, the three cases are consolidated for purposes of ruling on Cobank's motion for summary determination.

The Director filed a response to Cobank's motion for summary determination on January 19, 1999. The Secretary filed a response to the motion on February 18, 1999, and moved for summary determination on the question of whether NBC was immune from taxation by the State of Missouri. Cobank filed a reply brief on March 11, 1999.

Juan D. Keller, John P. Barrie, and B. Derek Rose, with Bryan Cave LLP, represent Cobank. Joyce Hainen, Legal Counsel, and Wood Miller, Senior Counsel, represent the Director. Assistant General Counsel Jill R. Jackson represents the Secretary.

On April 15, 1999, we issued an order withholding ruling on Cobank's motion for summary determination at that time because material issues of fact were not resolved. On May 4, 1999, the Director filed an affidavit and business records. On May 28, 1999, we issued an order to show cause by June 4, 1999, why we should not issue a ruling on Cobank's motion for summary determination. Because no party has shown cause why we should not rule on the motion, we issue this ruling on Cobank's motion for summary determination.

Under our Regulation 1 CSR 15-3.450(4)(C), we must grant a motion for summary determination "if the pleadings and evidence on file show that there is no genuine issue as to any material fact and that any party is entitled to relief as a matter of law[.]"

Findings of Fact

1. NBC was part of the Farm Credit System, a network of borrower-owned financial institutions and related service organizations specializing in providing credit and related services to farmers, ranchers, and producers or harvesters of aquatic products. NBC made loans to agricultural, aquatic, and public utility cooperatives.

2. NBC was a federally chartered instrumentality resulting from the merger of various banks for cooperatives.[1]

[1]The Director objects to Cobank's Exhibit A, a copy of NBC's charter, on grounds that the certification is not notarized and does not have the address of the signor. The exhibit is authenticated as required by section 490.220, RSMo 1994. 12 U.S.C. section 2141(a) likewise provides that NBC is a federally chartered instrumentality.

Its charter from the Farm Credit Administration became effective on January 1, 1989.

3. NBC was completely borrower-owned during the years at issue. The federal government held no stock in NBC.

4. Cobank is the successor to NBC. Cobank was established pursuant to the consolidation of NBC, the Springfield Bank for Cooperatives, and the Farm Credit Bank of Springfield. Cobank's charter from the Farm Credit Administration became effective on January 1, 1995.

5. Cobank filed amended Missouri income tax returns and applications for refund on behalf of NBC, requesting a refund of all Missouri income tax paid for 1991, 1992, and 1993 in the following amounts:

1991	$158,001
1992	$223,354
1993	$108,583

The Director denied the refund claims. Cobank protested, and the Director issued a final decision dated February 20, 1998, denying the protest.

6. Cobank filed an application for refund of $179,533 in Missouri income tax on behalf of NBC for 1994. The Director approved a refund of $32,703 and denied the remainder of the refund claim. Cobank protested, and the Director issued a final decision dated February 20, 1998, denying the protest.

7. On March 30, 1995, the Secretary issued a notice of

franchise tax assessment to Cobank as follows, with interest computed through April 30, 1995:

Year	Tax	Penalty	Interest
1991	$295,705.01	$73,926.25	$143,062.08
	Total for 1991:	$512,693.34	
1992	$280,662.98	$70,165.74	$102,183.77
	Total for 1992:	$453,012.49	
1993	$177,825.75	$44,456.43	$43,453.50
	Total for 1993:	$265,735.68	
1994	$226,019.09	$56,504.77	$28,171.01
	Total for 1994:	$310,694.87	
Grand Total		$1,542,136.38	

8. Cobank protested the assessment. On July 26, 1995, the Secretary issued a final determination denying Cobank's protest.

Conclusions of Law

This Commission has jurisdiction over appeals from the Director's final decisions. Section 621.050.1.[2] Cobank has the burden of proof. Section 621.050.2.

Section 143.071 imposes the Missouri income tax on corporations. The term "corporation" includes every corporation, association, joint stock company and joint stock association doing business in this state. Section 143.441.1(1). Cobank makes no argument that it is excluded from taxation

[2]Statutory references, unless otherwise noted, are to the 1994 Revised Statutes of Missouri.

because it is not a corporation.

Because NBC was the taxpayer during the years at issue, we examine the statutes pertaining to NBC. Cobank argues that NBC was exempt from taxation by the State of Missouri. Relying on constitutional principles first stated in ***McCulloch v. Maryland***, 17 U.S. 316 (1819), Cobank argues that it is a federally chartered institution and is thus immune from state taxation. Although this Commission does not have jurisdiction to address constitutional questions, ***State Tax Comm'n v. Administrative Hearing Comm'n***, 641 S.W.2d 69, 75-76 (Mo. banc 1982), we have a duty to make findings of fact and conclusions of law on petitions filed before us. Section 536.090; ***Farm Bur. Town & Country Ins. Co. v. Angoff***, 909 S.W.2d 348, 355 (Mo. banc 1995). We must apply the statutes, including section 143.011, as written. ***Bridge Data Co. v. Director of Revenue***, 794 S.W.2d 204, 207 (Mo. banc 1990). However, we may determine whether the statutes specifically exempted NBC from taxation.

The farmer-owned cooperative Farm Credit System was established to encourage farmer and rancher borrowers' participation in the management, control, and ownership of a system of credit for agriculture that is responsive to the credit needs of agricultural producers. 12 U.S.C. section 2001. NBC was formed by a merger of various banks for cooperatives. 12 U.S.C. section 2121 provides:

> The banks for cooperatives established pursuant to sections 2 and 30 of the Farm Credit Act of 1933, as amended, shall continue as federally chartered instrumentalities of the United States.

12 U.S.C. section 2134, regarding taxation, provides that:

> [e]ach bank for cooperatives and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such bank shall be exempt, both as to principal and interest from all taxation . . . now

or hereafter imposed by the United States or any State, territorial, or local taxing authority, except that interest on such obligations shall be subject to Federal income taxation in the hands of the holder.

This version of the statute has been in effect since 1988, and was thus in effect at the time of the formation of NBC. Prior to 1985 amendments, the law expressly exempted banks for cooperatives from taxation **if stock in the bank was held by the governor of the Farm Credit Administration.**[3]

Pub. L. No. 100-233, section 413, 101 Stat. 1640 (1988), as amended by Pub. L. No. 100-399, title IV, Sec. 405, 102 Stat. 1000 (1988) (*see* note to 12 U.S.C. section 2121), provided for a voluntary merger of banks for cooperatives. Paragraph (b)(4)(A) provided:

> If the stockholders of eight or more of the district banks for cooperatives approve the

[3]The prior version provided: "Such banks, their property, their franchises, capital, reserves, surplus, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, territorial, or local taxing authority. . . . The exemption provided in the preceding sentence shall apply only for any year or part thereof in which stock in the bank for cooperatives is held by the Governor of the Farm Credit Administration." Farm Credit Act of 1971, Pub. L. No. 92-181, 85 Stat. 609 (1971). Congress deleted this language in the 1985 amendment. Pub. L. No. 99-105, Title II, section 205(e)(16), 99 Stat. 1705 (1985).

> merger, such banks, and the Central Bank for Cooperatives, shall be merged into a single bank, which shall be referred to as the "National Bank for Cooperatives."

NBC is thus a result of the voluntary merger of district banks for cooperatives.

12 U.S.C. section 2141(a) provides:

> (a) Charter. The National Bank for Cooperatives or the United Bank for Cooperatives, as the case may be (hereinafter in this part referred to as the "consolidated bank"), established under section 413 of the Agricultural Credit Act of 1987, shall be a federally chartered instrumentality of the United States and an institution of the Farm Credit System.
>
> (b) Powers. The consolidated bank and the board of directors of such bank shall have all of the powers, rights, responsibilities, and obligations of the district banks for cooperatives and the Central Bank for Cooperatives and the boards of directors of such banks, except as otherwise provided for in this chapter.
>
> (c) Operation. The consolidated bank shall be organized and operated on a cooperative basis.

Thus, 12 U.S.C. section 2141, which specifically pertains to NBC, does not address taxation at all; nor do we find any other provision allowing an exemption for NBC.

Congress has expressly provided for complete immunity from taxation for some members of the Farm Credit System, such as Farm Credit Banks, 12 U.S.C. section 2023, and Federal land bank associations, 12 U.S.C. section 2098. If Congress had intended to confer upon NBC the more comprehensive exemption from taxation that it provided to Farm Credit Banks and Federal land bank associations, it presumably would have done so expressly, as it had elsewhere in the Farm Credit Act. ***See Russello v. United States***, 104 S. Ct. 296, 300 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting ***United States v. Wong Kim Bo***, 472 F.2d 720, 722 (5th Cir. 1972)). Instead, Congress gradually chipped away at the tax exemption formerly provided to the banks for cooperatives. The statutes do not exempt NBC from taxation by the State of Missouri.

Further, no part of the United States Government had any stock ownership in NBC during the years at issue. Even under the prior version of the law applicable to banks for cooperatives, 21 U.S.C. section 2134, the exemption did not apply if all stock held by the governor of the Farm Credit Administration had been retired.

In Rev. Rul. 84-109, the IRS addressed production credit associations (PCAs), which are also members of the farm credit system and are thus analogous to banks for cooperatives. The IRS stated:

> PCAs originally served a governmental function, by making loans available regardless of profit potential. In order to facilitate this

> function the PCAs were made instrumentalities of the United States and were given an exemption from both federal and local taxation. However, some PCAs, such as the one in this case, are now totally controlled by private owners, perform no substantial governmental functions and operate as profit seeking financial institutions in competition with private banks and savings and loans. These PCAs are financially autonomous and are not funded by the federal government. They are not subject to substantial government control. There is no tax exemption for the PCA described in the instant situation. . . .Thus, the description of these PCAs as federal instrumentalities does not reflect their true economic function[.]

The United States Supreme Court stated in ***Arkansas v. Farm Credit Servs. of Central Arkansas***, 117 S. Ct. 1776, 1782 (1997):

> The PCAs' business is making commercial loans, and all their stock is owned by private entities. Their interests are not coterminous with those of the Government any more than most commercial interests.

Similarly, as no part of the United States Government had any stock ownership in NBC during the years at issue, NBC was not under the control of the United States Government. NBC has not established that it is a federal instrumentality that is statutorily exempt from taxation by the State of Missouri.

Summary

We do not have jurisdiction to address constitutional questions. Cobank has failed to prove that any statute exempts or exempted NBC from taxation by the State of Missouri. Therefore, we deny Cobank's income tax refund claims on behalf of NBC for 1991 through 1994. We deny Cobank's motion for summary determination as to Case Nos. 98-0716 RI and 98-0718 RI, and we grant summary determination in favor of the Director. Regulation 1 CSR 15-3.450(4)(C).

We have resolved only one issue presented in the franchise tax case. Therefore, we deny summary determination to Cobank in Case No. 95-2048 SS, but we do not grant summary determination in favor of the Secretary. We will set case No. 95-2048 SS for hearing by separate notice if necessary.

SO ORDERED on June 18, 1999.

WILLARD C. REINE
Commissioner

PRODUCTION CREDIT ASSOCIATION OF EASTERN NEW MEXICO, Appellant,
v.
TAXATION AND REVENUE DEPARTMENT of the STATE of New Mexico, Appellee.

No. 20078.

Court of Appeals of New Mexico.

Feb. 1, 2000.

Appeal from the New Mexico Taxation and Revenue Department; Gerald B. Richardson, Hearing Officer.

Curtis W. Schwartz, Timothy R. Van Valen, Modrall, Sperling, Roehl, Harris & Sisk, P.A., Santa Fe, for Appellant.

Patricia A. Madrid, Attorney General, David C. Iglesias, Chief Counsel, Monica M. Ontiveros, Special Assistant Attorney General, Taxation and Revenue Department, Santa Fe, Frank D. Katz, Special Assistant Attorney General, Santa Fe, NM, for Appellee.

OPINION

PICKARD, Chief J.

10E Production Credit Association of Eastern New Mexico (PCA) filed a claim for refund of New Mexico corporate income and franchise taxes for the 1992-1996 tax years with the New Mexico Taxation and Revenue Department (Department). PCA claimed it was entitled to a refund because (1) Congress declared production credit associations like PCA to be federal instrumentalities, (2) federal instrumentalities are inherently

immune from state taxation under the Supremacy Clause of the United States Constitution unless Congress expressly waives their immunity, and (3) Congress did not expressly waive PCA's immunity for the tax years at issue. The Department's internal hearing officer denied PCA's claim on the grounds that (1) Congress expressly waived the tax immunity enjoyed by privately owned production credit associations in the Farm Credit Act of 1933 and (2) Congress did not intend to confer upon these associations an implied immunity from state taxation by passing the Farm Credit Amendments Act of 1985, which repealed the express tax immunity waiver that had been in place since Congress passed the Farm Credit Act of 1933. We agree with the hearing officer and affirm his decision for the reasons stated below.

BACKGROUND AND PROCEDURAL HISTORY

20E In 1916, Congress passed the Federal Farm Loan Act (1916 Act). See Pub.L. No. 64-158, §§ 4, 12, 39 Stat. 360, 362-64, 370-72 (1916). The 1916 Act established the Farm Credit System (System). See id. The System was created for the purpose of providing secured credit to farmers and ranchers at reasonable cost. See S .Rep. No. 144, at 2-3 (1916). The System, which then consisted of twelve regional land banks, could make loans only to farmers and ranchers. See Pub.L. No. 64-158, §§ 4, 12, 39 Stat. at 362-64, 370-72. The loans had to be secured by first mortgages on farm or ranch property. See id. Seven years later, Congress created federal intermediate credit banks for the purpose of making farm and ranch loans that could be secured by something other than first mortgages on farm or ranch lands. See Pub.L. No. 67- 503, § 202(a)(3), 42 Stat. 1454, 1455 (1923).

30E In 1933, Congress, in response to the Great Depression, passed the Farm Credit Act of 1933 (1933 Act). See Pub.L. No.

73-75, § 20, 48 Stat. 257, 259. The 1933 Act established production credit associations (credit associations) like PCA for the purpose of providing short- and intermediate-term loans to farmers and ranchers. See S.Rep. No. 124, at 2 (1933). The United States initially capitalized and owned all the stock in the credit associations. See id. Pursuant to statute, the credit associations were exempt from state taxation while the federal government owned stock in them. See Pub.L. No. 73- 75, § 63, 48 Stat. at 267. However, pursuant to the same statute, once the federal government's stock was retired, the 1933 Act expressly waived the credit associations' immunity from state income and franchise taxes. See id. Congress hoped that the United States' ownership interest in the credit associations would come to an end at some point and that the credit associations would eventually become locally owned by their borrowers. See S.Rep. No. 124, at 2.

40E In order to fulfill its hope, Congress required farmers and ranchers to purchase stock in the credit association from which they were borrowing in an amount equal to 10% of the unpaid principal balance of their respective loans. As part of the loans, sufficient proceeds were generally advanced to the borrowers to purchase the required stock. Congress's hope was realized in the 1960s, by which time the credit associations were owned entirely by the farmers and ranchers who had borrowed money from them. The federal government no longer had an ownership interest in any credit association, nor has it since.

50E The Farm Credit Administration, which is the federal body responsible for regulating and examining the entities within the System, authorized the incorporation of PCA as a credit association in 1934. As an incorporated and federally chartered credit association, PCA is a statutorily declared federal instrumentality. See 12 U.S.C. § 2071(a), (b)(7), § 2077

(1994). PCA's corporate purpose, like that of all other credit associations, is to exercise the powers granted to it by Congress under the 1933 Act as it existed or as it has been amended. Among other things, PCA loans money for periods of ten years or less; does not lend to the general public, but lends only to qualified ranchers or farmers; is not a depository bank; and has no deposit insurance.

60E In 1971, Congress passed the Farm Credit Act of 1971 (1971 Act). See Pub.L. No. 92-181, § 2.17, 85 Stat. 583, 602 (1971). The 1971 Act made a number of significant changes to the 1933 Act, but retained the tax provisions contained within the 1933 Act. See id. The tax provisions in the 1971 Act provided in relevant part:

> Each production credit association and its obligations are instrumentalities of the United States.... Such associations, their property, their franchises, capital, reserves, surplus, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, territorial, or local taxing authority.... The exemption provided in the preceding sentence shall apply only for any year or part thereof in which stock in the production credit association is held by the Governor of the Farm Credit Administration.

Id. (emphasis added).

70E In 1985, Congress passed the Farm Credit Amendments Act of 1985 (1985 Act). See Pub.L. No. 99-205, § 205, 99 Stat. 1678 (1985). The 1985 Act, among other things, repealed the highlighted sentences in the taxation section of the 1971 Act quoted above. See id., § 205(d)(16), 99 Stat. at 1705. As a

result, the limited waiver of immunity from state taxation that had been expressly worded in both the 1933 Act and the 1971 Act was not explicitly mentioned in the 1985 Act.

80E PCA timely filed New Mexico corporate income tax returns and timely paid New Mexico corporate income taxes for the tax years 1992, 1993, 1994, 1995, and 1996. PCA timely submitted claims for refund of all New Mexico income taxes paid for tax years 1992-1996 in the total amount of $343,782. PCA based its claims for refund upon its understanding that, as a federal instrumentality, it is immune from state taxation pursuant to the Supremacy Clause of the Constitution. After the Department denied its claims, PCA timely filed a protest. In this consolidated proceeding, PCA seeks all amounts claimed as refunds for its 1992-1996 tax years, plus interest thereon, as provided in NMSA 1978, § 7-1-68 (1996).

STANDARD OF REVIEW

90E The issue presented for our review is whether Congress intended to confer tax immunity upon privately owned production credit associations by passing the 1985 Act, which repealed the express tax immunity waiver contained in both the 1933 Act and the 1971 Act. The parties submitted this issue to the Department's internal hearing officer for consideration upon stipulated facts. Accordingly, we are presented with an issue of law, which we must review de novo. See State v. Ogden, 118 N.M. 234, 240, 880 P.2d 845, 851 (1994) (ruling that issues of law are reviewed de novo); State v. Romero, 119 N.M. 195, 197, 889 P.2d 230, 232 (Ct.App.1994) (ruling that interpretation of statute is an issue of law). In conducting our review, we will not defer to the hearing officer's decision "because it is the function of the courts to interpret the law." Morningstar Water Users Ass'n v. New Mexico Public Utility Comm'n, 120 N.M. 579, 583, 904 P.2d 28, 32 (1995).

DISCUSSION

I. FEDERAL INSTRUMENTALITY

100E PCA claims it is an instrumentality of the federal government. We agree. The 1933 Act expressly stated that credit associations like PCA are federal instrumentalities. See Pub.L. No. 73-75; § 63, 48 Stat. at 267. Although Congress significantly altered the 1933 Act when it passed the 1971 Act, Congress nevertheless maintained the classification of credit associations as instrumentalities of the federal government in the 1971 Act. See 12 U.S.C. § 2071(a) ("Each production credit association shall continue as a Federally chartered instrumentality of the United States."); 12 U.S.C. § 2077 ("Each production credit association and its obligations are instrumentalities of the United States...."). These provisions were not disturbed when Congress passed the 1985 Act, and they remain in effect to this day. In view of the fact that PCA is a federal instrumentality, we next address the consequences that result from PCA's status.

II. IMMUNITY FROM STATE TAXATION

A. Inherent Immunity

110E PCA claims credit associations, as federal instrumentalities, are inherently immune from state taxation under the Supremacy Clause of the United States Constitution unless Congress expressly waives that immunity. The Department counters that PCA's focus on constitutional immunity is misplaced because

> Congress did not rely on constitutional immunity in the original or subsequent Farm Credit Acts or enact a waiver of constitutional immunity. Rather Congress enacted both an explicit statutory immunity from state (and federal) taxes and an express statutory exception to that immunity for PCAs no longer federally owned.

In light of its contention, the Department intimates that credit associations like PCA would be subject to state taxation--even though Congress has deemed them to be federal instrumentalities--if not for Congress expressly granting them immunity from state taxation. We disagree with the Department. The Supremacy Clause inherently bars state taxation of federal instrumentalities, see McCulloch v. Maryland, 17 U.S. 316, 435-36 (1819), unless taxation is "authorized by Congress," see First Agric. Nat'l Bank v. State Tax Comm'n, 392 U.S. 339, 340 (1968).

120E As PCA claims, the now time-honored rule set forth in McCulloch has been followed by an unbroken line of Supreme Court decisions. See, e.g., United States v. Tax Comm'n, 421 U.S. 599, 605 (1975) (holding that state could not impose tax upon sales to military base); Department of Employment v. United States, 385 U .S. 355, 358-59 (1966) (holding that Red Cross as a federal instrumentality is immune from state taxation); Federal Land Bank v. Board of County Comm'rs, 368 U.S. 146, 149 (1961) (stating that "a federal instrumentality is not subject to the plenary power of the States to tax"); United States v. County of Allegheny, 322 U.S. 174, 176 (1944) ("[S]ince 1819, when Chief Justice Marshall in the McCulloch case expounded the principle that ... instrumentalities of the Federated Government are immune from taxation by [the States], this Court never has departed from that basic doctrine or wavered in its application."); Osborn v. Bank of the United States, 22 U.S. 738, 865 (1824) (ruling that congressional silence as to immunity from state taxation of federal

instrumentality did not change the fact that it was immune from state taxation); see also Peisker v. Unemployment Comp. Comm'n, 45 N.M. 307, 309, 115 P.2d 62, 63 (1941) (stating rule of McCulloch). In view of the fact that PCA is inherently immune from state taxation, we must next address whether Congress purposely waived its immunity and whether further legislation was intended to be a return to inherent immunity.

B. Congressional Waiver

130E The Department's internal hearing officer concluded, and PCA concedes, that Congress expressly waived the inherent tax immunity enjoyed by privately owned credit associations in both the 1933 Act and the 1971 Act. The hearing officer also concluded that Congress did not intend, by passing the 1985 Act, to confer upon these credit associations an implied immunity from state income and franchise taxes. In order to draw this conclusion, the hearing officer looked to the entire legislative history and congressional intent underlying the 1985 Act.

140E PCA contends the hearing officer erred by delving into legislative history and congressional intent because the 1985 Act expressly repealed the pre-existing waiver of tax immunity contained within the 1933 Act without qualification or equivocation. According to PCA, under the plain meaning rule, we must give effect to the 1985 Act's language and refrain from further interpretation because its language is clear and unambiguous. See State v. Jonathan M., 109 N.M. 789, 790, 791 P.2d 64, 65 (1990) (stating the plain meaning rule).

150E PCA correctly points out that neither an administrative agency nor an appellate court can resort to legislative history or the principles of statutory construction when the statute in question is clear and unambiguous. However, PCA is mistaken

in its contention that a statute that is apparently clear and unambiguous on its face is always subject to the plain meaning rule. As our Supreme Court has stated:

> [C]ourts must exercise caution in applying the plain meaning rule. Its beguiling simplicity may mask a host of reasons why a statute, apparently clear and unambiguous on its face, may for one reason or another give rise to legitimate ... differences of opinion concerning the statute's meaning. In such a case, it can rarely be said that the legislation is indeed free from all ambiguity and is crystal clear in its meaning. While ... one part of the statute may appear absolutely clear and certain to the point of mathematical precision, lurking in another part of the enactment, or even in the same section, or in the history and background of the legislation, or in an apparent conflict between the statutory wording and the overall legislative intent, there may be one or more provisions giving rise to genuine uncertainty as to what the legislature was trying to accomplish. In such a case, it is part of the essence of judicial responsibility to search for and effectuate the legislative intent--the purpose or object--underlying the statute. See Perea [v. Baca], 94 N.M. [624,] 627, 614 P.2d [541,] 544 [(1980)] (courts are permitted to interpret by looking to legislative intent if there is any doubt as to the meaning of the words) (emphasis added); State v. Herrera, 86 N.M. 224, 225-26, 522 P.2d 76, 77-78 (1974) (statute construed based on perceived legislative object and purpose, rather than on literal language)....

State ex rel. Helman v. Gallegos, 117 N.M. 346, 353, 871 P.2d 1352, 1359 (1994) (emphasis added).

160E As we explain below, both the history and background of the 1985 Act, and the apparent conflict between the 1985 Act's wording and the overall legislative intent expressly set out in the 1933 and 1971 acts, give rise to genuine uncertainty, as to what Congress was trying to accomplish when it passed the 1985 Act. Consequently, we must search for and effectuate the legislative intent underlying the 1985 Act.

1. 1933 Act and 1971 Act

170E We first consider the legislative acts that preceded the 1985 Act. In the 1933 Act, Congress expressly stated that it intended for credit associations to lose their immunity from state taxation when the federal government no longer owned stock in them. See Pub.L. No. 73-75, § 63, 48 Stat. at 267. In the 1971 Act, Congress continued to evince that intention. See Pub.L. No. 92-181, § 2.17, 85 Stat. at 602. In particular, Congress continued to expressly limit the tax immunity enjoyed by credit associations by stating

> [production credit] associations, their property, their franchises, capital, reserves, surplus, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or any State, territorial, or local taxing authority.... The exemption provided in the preceding sentence shall apply only for any year or part thereof in which stock in the production credit association is held by the Governor of the Farm Credit Administration.

See id. (emphasis added). In view of the express language contained in both the 1933 Act and the 1971 Act, we hold that Congress intended to subject privately owned credit associations to state income and franchise taxes prior to passing the 1985 Act.

2. 1985 Act

180E In the 1985 Act, Congress repealed the two sentences in the taxation section of the 1971 Act that expressly exempted credit associations from state taxation until the federal government no longer held an ownership interest in them. See Pub.L. No. 99-205, § 205(d)(16), 99 Stat. at 1705. As a consequence, the express waiver that had appeared in both the 1933 Act and the 1971 Act no longer appeared in the 1985 Act. According to the Department, that result leaves us to consider (1) whether the deletion was intended simply to omit unnecessary language, having no substantive effect, since the waiver exception had completely swallowed the qualified exemption or (2) whether Congress intended a complete about-face on the issue of state taxation of credit associations. As we discuss below, we believe Congress simply intended to omit unnecessary language.

a) Surplus Language

190E As we stated above, Congress intended to subject privately owned credit associations to state income and franchise taxes under both the 1933 Act and the 1971 Act. Indeed, Congress hoped that the federal government's ownership interest in the credit associations would come to an end at some point and that the credit associations would eventually become locally owned by their borrowers. See S.Rep. No. 124, at 2, Congress's hope was realized in 1968, by which time every credit association was, in fact, privately

owned by the farmers and ranchers who had borrowed money from them. It would therefore have been useless, mere surplusage, for Congress to include an express waiver in the 1985 Act. By that time, every court that had had the occasion to address the taxability of privately owned credit associations honored Congress's intent and held in the tax collector's favor. See, e.g., Woodland Prod. Credit Ass'n v. Franchise Tax Bd., 37 Cal.Rptr. 231, 233 (Ct.App.1964) ("It is difficult ... to avoid the belief that, once these associations became farmer-owned, Congress meant to place them on a tax parity with comparable, privately held entities."); Montana Livestock Prod. Credit Ass'n v. State, 393 P.2d 50, 53 (Mont.1964); Columbus Prod. Credit Ass'n v. Bowers, 180 N.E.2d 1, 2 (Ohio 1962); Baker Prod. Credit Ass'n v. State Tax Comm'n, 421 P.2d 984, 985 (Or.1966) (en banc).

b) Technical Changes

200E In view of the fact that, by 1985, Congress had evinced its intention to subject privately owned credit associations to state taxation for well over 50 years and that the courts had uniformly supported Congress's power to do so, it would have been a major substantive change in legislative direction to suspend state taxation of such associations. As the Department argues, if Congress intended to make a major substantive change in the way credit associations were taxed by passing the 1985 Act, "one would expect that there would be some mention of the change in the legislative history." And yet there is none. To the contrary, the House Report commentary on Section 205 of the 1985 Act states:

> Section 205 contains numerous technical and conforming amendments to the provisions of the Farm Credit Act of 1971 affected by changes in the basic powers, duties and authorities of the

> Farm Credit Administration. This section would amend the appropriate provisions of the Act to delete the requirement for specific approval by the Farm Credit Administration of certain activities of the banks and associations and by deleting the general authority of the Farm Credit Administration to supervise System institutions. These changes are consistent with one of the major purposes of the legislation which is to establish the Farm Credit Administration as an arms length regulator of the System institutions and to take it out of certain activities of the System which would involve it in management discretion of such institutions.

H.R.Rep. No. 425, at 28 (1985).

210E Thus, neither the 1985 Act nor its written legislative history indicates any intention by Congress to purposefully remove the long-standing waiver of immunity from privately owned credit associations. We agree with the Department that "[i]t is extraordinarily unlikely that Congress would have intended such a marked change in the tax status of PCAs without a single mention of such change in any of the legislative history."

c) Return to Inherent Immunity

220E PCA's retort to this legislative history and congressional intent analysis is that "the Constitution provides immunity unless waived; and it is clear that the immunity was not waived for the period of PCA's claim for refund." PCA intimates that in light of McCulloch, Congress did not and could not legislate out of existence the credit associations' inherent immunity from state taxation under the Supremacy Clause without some

current express language doing so. We disagree.

230E In McCulloch, the Supreme Court determined that states lack the power to tax federal instrumentalities due to the Supremacy Clause. See McCulloch, 17 U.S. at 435-36. Thus, when Congress is completely silent on state taxation of a federal instrumentality, the Supremacy Clause would bar state taxation. See Osborn, 22 U.S. at 865. However, when Congress expresses its intention to subject a federal instrumentality to state taxation, it is obvious that the Supremacy Clause would permit taxation. See First Agric. Nat'l Bank, 392 U.S. at 340 (ruling that national banks, as federal instrumentalities, are only subject to state taxation to the extent authorized by Congress).

240E In the case at bar, Congress expressly waived the state tax immunity of privately owned credit associations since credit associations were first created by the 1933 Act. Although the language waiving the exemption from state taxation was dropped in the 1985 Act, our analysis of the 1985 Act's entire legislative history, both that in the Congressional Record and that shown by the historical background of the legislation, leads us to the conclusion that Congress did not intend to confer tax immunity upon privately owned credit associations in the 1985 Act. We therefore hold that PCA is not immune from the imposition of corporate income tax under the Supremacy Clause of the United States Constitution.

250E In crafting this holding, we acknowledge that the other courts that have considered the issue now before us for appellate review have ruled that, under the 1985 Act, all credit associations are immune from state taxation. See, e.g., Arkansas v. Farm Credit Servs., 994 S.W.2d 453 (Ark.1999); Farm Credit Servs. of Mid-America v. Department of State Revenue, 705 N.E.2d 1089 (Ind.TaxCt.1999). These courts, without exception, have based their decisions on the well-settled rule

that federal instrumentalities retain their inherent immunity from state taxation in the face of Congressional silence. See Arkansas, 994 S.W.2d at 455 ("Our federal government is immune from taxation imposed by the state, unless that immunity is waived, explicitly or expressly, by a statutory waiver of that immunity."); Farm Credit Servs. of Mid-America, 705 N.E.2d at 1092 ("The rule that the Supremacy Clause bars state taxation of federal instrumentalities, absent congressional waiver, dates from the U.S. Supreme Court's decision in McCulloch ....") (footnote omitted). Due to the fact that the 1985 Act fails to expressly waive the tax immunity enjoyed by credit associations, these courts have concluded that such associations are not subject to state taxation. See Arkansas, 994 S.W.2d at 456 ("The current version of § 2077, with its silence on the issue [of state taxation], compels a holding of immunity ...."); Farm Credit Servs. Of Mid-America, 705 N.E.2d at 1092 ("Because Congress has not waived ... immunity from state taxation, under the Supremacy Clause, Indiana is without power to collect the [tax] from Mid-America.").

260E In our view, these courts' narrow and exclusive focus on the 1985 Act's language produces a logical but incorrect result. We agree with the courts that if we looked at the law only at the time when PCA was taxed, PCA would be entitled to a refund for the 1992-1996 tax years because the 1985 Act is silent on the issue of state income taxation. Our review of the issue presented on appeal, however, is not confined to a cursory or wooden analysis of the 1985 Act. See Gallegos, 117 N.M. at 353, 871 P.2d at 1359 (ruling that it is our responsibility to search for and effectuate the legislative intent underlying the statute in question). After examining the 1985 Act's clear and extensive legislative history, we believe, for the reasons stated above, that Congress has unequivocally evinced its unwavering intention to subject privately owned credit associations to state

income taxation. In particular, we are most persuaded by the dissent in Farm Credit Services v. Arkansas, 76 F.3d 961, 967 (8th Cir.1996) (Loken, J., dissenting), rev'd on other grounds, 520 U.S. 821 (1997). We must give deference to that intention. See State v. Herrera, 86 N.M. 224, 225-26, 522 P.2d 76, 77-78 (1974) (ruling that when a legislative body's perceived legislative intent fails to coincide with a statute's wording, it is the perceived intent, and not the statute's literal language, that we must vindicate).

CONCLUSION

270E For the reasons stated, we affirm.

280E IT IS SO ORDERED.

BUSTAMANTE and SUTIN, JJ., concur.

Supreme Court, U.S.
FILED
JUN 2 2000
OFFICE OF THE CLERK

No. 99-1792

In The

Supreme Court of the United States

DIRECTOR OF REVENUE,

Petitioner,

vs.

COBANK, ACB, AS SUCCESSOR TO THE NATIONAL BANK FOR COOPERATIVES,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Missouri

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RICHARD A. HANSON
(Counsel of Record)
THEODORE R. BOTS
McDERMOTT, WILL & EMERY
227 West Monroe Street
Chicago, Illinois 60606
(312) 984-7799

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does 12 U.S.C. Section 2134 authorize states to tax the income of the National Bank for Cooperatives, a federally chartered instrumentality of the United States?

DISCLOSURE UNDER SUPREME COURT RULE 29.6

Neither CoBank, ACB, nor the National Bank for Cooperatives has a parent corporation, and no public held company owns ten percent or more of the stock of either entity.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

DISCLOSURE UNDER SUPREME COURT RULE 29.6 ii

TABLE OF AUTHORITIES iv

CONSTITUTIONAL AND STATUTORY PROVISIONS 1

INTRODUCTION AND STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 7

I. The Petition Raises a False Question 8

II. Missouri Correctly Applied Established Principles of Law 9

III. There is No State Court Conflict Which Warrants This Court's Review 13

IV. This Case Impacts Only a Handful of Farm Credit System Institutions 15

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES:

Appeal of Farm Credit Services of Central Kansas, et al., Dkt. Nos. 1998-2839-DT through 1998-2845-DT (Kan. Bd. Tax App. 1999) 12

Arkansas v. Farm Credit Services of Central Arkansas, 994 S.W.2d 453 (Ark. 1999), *cert. denied*, 120 S. Ct. 1530 (2000) 12

Farm Credit Services of Central Arkansas v. Arkansas, 76 F.3d 961 (8th Cir. 1996), *rev'd on other grounds*, 520 U.S. 821 (1997) 12

Farm Credit Services of Mid-America v. Department of State Revenue, 677 N.E.2d 645 (Ind. Tax 1997), *review denied*, 690 N.E.2d 1186 (Ind. 1997) 12

Farm Credit Services of Mid-America v. Department of State Revenue, 705 N.E.2d 1089 (Ind. Tax 1999), *review granted*, Dkt. No. 49S10-9908-TA-453 (Ind. 1999) 12

Federal Land Bank of Wichita v. Board of County Commissioners, 788 F.2d 1440 (10th Cir. 1986) 11

First Agricultural National Bank of Berkshire County v. State Tax Commission, 392 U.S. 339 (1968) 9, 10, 11

Northwest Louisiana Production Credit Association v. State of Louisiana, Department of Revenue and Taxation, 746 So.2d 280 (La. Ct. App. 1999) 12

Production Credit Association of Eastern New Mexico v. Taxation and Revenue Department, ___ P.2d ___, 2000 WL 300857 (N.M. Ct. App. 2000), *cert. denied*, No. 26,211 (N.M. 2000) 13

TABLE OF AUTHORITIES – Continued

Page

Production Credit Association of Southeastern Missouri, et al. v. Director of Revenue, 10 S.W.3d 142 (Mo. 2000) 6, 12

United States v. Michigan, 851 F.2d 803 (6th Cir. 1988) 11

United States v. State Tax Commission, 481 F.2d 963 (1st Cir. 1973) 10

Utah Production Credit Association v. Auditing Division of the Utah State Tax Commission, App. Nos. 97-0425 and 99-0105 (Utah State Tax Comm. 1999) 12

UNITED STATES CONSTITUTION:

United States Constitution, Article VI, clause 2 1

STATUTES:

12 U.S.C. § 2071 5

12 U.S.C. § 2077 ..... 14, 15

12 U.S.C. § 2134 ..... *passim*

12 U.S.C. § 2141 ..... 1, 2

12 U.S.C. § 2278b-6 3

OTHER:

Farm Credit Amendments Act of 1985, Pub. L. No. 99-205, 99 Stat. 1678 (1985) 3

Agricultural Credit Act of 1987, Pub. L. No. 100-233, 101 Stat. 1568 (1987) 2, 3

H.R. Rep. No. 425, 99th Cong. 1st Sess. (1985) 5

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Article VI, clause 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

12 U.S.C. § 2141:

> (a) Charter
>
> The National Bank for Cooperatives or the United Bank for Cooperatives, as the case may be (hereinafter in this part referred to as the "consolidated bank"), established under section 413 of the Agricultural Credit Act of 1987, shall be a federally chartered instrumentality of the United States and an institution of the Farm Credit System.
>
> (b) Powers
>
> The consolidated bank and the board of directors of such bank shall have all of the powers, rights, responsibilities, and obligations of the district banks for cooperatives and the Central Bank for Cooperatives and the boards of directors of such banks except as otherwise provided for in this chapter.
>
> (c) Operation
>
> The consolidated bank shall be organized and operated on a cooperative basis.

INTRODUCTION AND STATEMENT OF THE CASE

This case involves the question of whether Congress has authorized states to tax the income of the National Bank for Cooperatives. The Missouri Supreme Court correctly held that Congress has not authorized such taxation.

The National Bank for Cooperatives is a member institution of the Farm Credit System. It was established pursuant to Section 413 of the Agricultural Credit Act of 1987, Pub. L. No. 100-233, § 413, 101 Stat. 1568, 1639 (1987). Section 413 authorized the consolidation of the existing district banks for cooperatives and the Central Bank for Cooperatives to form the National Bank for Cooperatives.

Sections 414 through 416 of the Agricultural Credit Act of 1987, now codified at 12 U.S.C. Sections 2141 to 2149, set forth the federal charter, and the powers and operations for the National Bank for Cooperatives. 12 U.S.C. Section 2141(a) states that the National Bank for Cooperatives "shall be a federally chartered instrumentality of the United States . . . "

12 U.S.C. Section 2141(b) provides that the National Bank for Cooperatives shall have "all of the powers, rights, responsibilities, and obligations of the district banks for cooperatives and the Central Bank for Cooperatives . . . " At the time of the creation of the National Bank for Cooperatives in 1989, the only statutory provision dealing with the state tax obligations of the district banks for cooperatives and the Central Bank for Cooperatives was 12 U.S.C. Section 2134. Section 2134 provides:

> Each bank for cooperatives and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such bank shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territorial, or local taxing authority, except that interest on such obligations shall be subject to Federal income taxation in the hands of the holder.[1]

The 1985 Amendment to 12 U.S.C. Section 2134

In response to the agricultural depression of the mid-1980s, Congress adopted the Farm Credit Amendments Act of 1985. Pub. L. No. 99-205, 99 Stat. 1678 (1985). As part of that legislation, Congress authorized the United States Treasury to provide new federal financial assistance to the Farm Credit System. Farm Credit Amendments Act of 1985, Pub. L. No. 99-205, § 4.28J, 99 Stat. 1678, 1686 (1985). The new federal investment was to be made indirectly through the Farm Credit System Capital Corporation.[2] *Id.* Previous federal funds had been provided directly to individual Farm Credit System institutions.

---

[1] The concluding phrase "except that interest . . . " was added to Section 2134 by the Agricultural Credit Act of 1987, Pub. L. No. 100-233, § 805(p), 101 Stat. 1568, 1716 (1988).

[2] The Capital Corporation was later replaced by the Financial Assistance Corporation, created as part of the Agricultural Credit Act of 1987. 12 U.S.C. Section 2278b.

As part of the Farm Credit Amendments Act of 1985, Congress also amended 12 U.S.C. Section 2134. This was done by repealing the last two sentences of Section 2134. Prior to this amendment, Section 2134 had read as follows (the language which was deleted is indicated by brackets):

> Each bank for cooperatives and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such bank shall be exempt, both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territorial, or local taxing authority. [[Such banks, their property, their franchises, capital, reserves, surplus, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, territorial, or local taxing authority; except that interest on the obligations of such banks shall be subject only to Federal income taxation in the hands of the holder thereof pursuant to the Public Debt Act of 1941 (31 U.S.C. 742(a)) and except that any real and tangible personal property of such banks shall be subject to Federal, State, territorial, and local taxation to the same extent as similar property is taxed. The exemption provided in the preceding sentence shall apply only for any year or part thereof in which stock in the bank for cooperatives is held by the Governor of the Farm Credit Administration.]]

Congress explained its reason for repealing the last two sentences of Section 2134, as follows:

> This section also contains amendments which conform specific sections of the Act to the change made by the merger of the revolving funds and the elimination of the authority to make separate investments in individual institutions. As amended by the Act, the Farm Credit Administration may only make investments from the section 4.0 revolving fund in the Farm Credit System Capital Corporation.

H.R. Rep. No. 425, 99th Cong. 1st Sess. (1985), at 28-29.

The Decision Below

In the proceeding below, the National Bank for Cooperatives sought a refund of Missouri corporate income tax for the years 1991 through 1994. At the Missouri Supreme Court, its case was consolidated with a similar case filed by various Production Credit Associations which were also seeking refunds of Missouri corporate income tax. Like the National Bank for Cooperatives, Production Credit Associations are member institutions of the Farm Credit System and "federally chartered instrumentalities of the United States." 12 U.S.C. Section 2071.

Before the Missouri Supreme Court, the National Bank for Cooperatives argued that it is a federal instrumentality and exempt from Missouri income tax absent Congressional authorization. The National Bank for Cooperatives further argued that Congress did not authorize such state taxation.

The National Bank for Cooperatives explained that prior to the 1985 amendment of Section 2134, banks for cooperatives were exempt from state tax only if the federal government had a direct investment in such banks.

This direct investment requirement was repealed simultaneously with the 1985 authorization of new indirect federal funding. Thus, as amended in 1985, Section 2134 no longer authorized state taxation of the banks for cooperatives, including the National Bank for Cooperatives, without regard to the presence of direct federal investment.

Citing a number of prior decisions holding Farm Credit System institutions exempt from state taxation after 1985, the Missouri Supreme Court held that the National Bank for Cooperatives and the Production Credit Associations are exempt. The court stated:

> [T]his Court holds, as have the other courts that have addressed the issue of state taxation of member institutions of the Farm Credit System, that appellants are exempt from state income taxation. See *Farm Credit Serv. of Cent. Ark. v. Arkansas*, 76 F.3d 961, 964 (8th Cir. 1996), *rev'd on other grounds*, 520 U.S. 821, 117 S.Ct. 1776, 138 L.Ed.2d 34 (1997); *State v. Farm Credit Serv. of Cent. Ark.*, 338 Ark. 322, 994 S.W.2d 453, 456 (1999), *petition for cert. filed*, 68 U.S.L.W. 3401 (Sept. 28, 1999) (No. 99-993); *Farm Credit Serv. of Mid-America v. Department of State Revenue*, 705 N.E.2d 1089, 1092 (Ind. Tax Ct. 1999); *Northwest La. Prod. Credit Ass'n v. State*, 98 CA 1995, 1999 WL 1000995 (La. Ct. App. Nov. 5, 1999).

Production Credit Association of Southeastern Missouri, et al. v. Director of Revenue, 10 S.W.3d 142, 143 (Mo. 2000). The Missouri Department of Revenue now seeks this Court's review of the decision of the Missouri Supreme Court with respect to the National Bank for Cooperatives. For unexplained reasons, the Department has not appealed the decision with respect to Production Credit Associations.

REASONS FOR DENYING THE WRIT

The writ should be denied because this case does not involve the question which petitioner claims is present. The writ should also be denied because the Missouri Supreme Court correctly applied the established rule that federal instrumentalities are exempt from state taxation absent Congressional authorization.

The writ should be denied because the purported conflict which the petition attempts to highlight is based on one decision by the intermediate appellate court in New Mexico, holding that Congress has authorized states to tax Production Credit Associations. That decision is suspect because the court was not presented with an accurate picture of the legislative history regarding the 1985 amendments to the Farm Credit Act, and turned on the application of New Mexico statutory construction rules which authorize the New Mexico courts to ignore statutory language and substitute the courts' own view of legislative intent.

Further, because this case involves only the question of the proper construction of Section 2134, it impacts a small number of Farm Credit System entities. The issue presented is not sufficiently significant to warrant this Court's review.

Finally, if the Court is inclined to intervene on the issue of state taxation of the National Bank for Cooperatives, it should defer action pending decisions in the other state courts which are considering the question presented in this case. If these decisions establish that there is a consensus in the state courts on this issue, further review will be unnecessary.

I. The Petition Raises a False Question

The petition filed by the Missouri Department of Revenue alleges that this case raises the following question:

> Whether Congress, by repealing a contingent exemption from state taxation that included immunity from state income taxes for a Farm Credit System institution, and enacting in lieu thereof a noncontingent exemption that did not include state income taxes, permitted that institution to avoid the specific effects of the statute and partake instead of inherent immunity.

The petition's description of what Congress did in 1985 when it amended 12 U.S.C. Section 2134 is simply wrong. As discussed above, Congress repealed the last two sentences of Section 2134 which had previously authorized state taxation of district banks for cooperatives and the Central Bank for Cooperatives. It did not add anything new to the statute.

II. Missouri Correctly Applied Established Principles of Law

The Missouri Supreme Court decided this case by applying the established rule that federal instrumentalities are exempt from state tax absent Congressional authorization. Petitioner does not challenge the finding that the National Bank for Cooperatives is a federal instrumentality or that it is exempt from tax absent Congressional authorization. Petitioner claims only that Congress has authorized such taxation. Thus, this case presents only a question of the proper construction of Section 2134. It does not present any broader statutory or constitutional questions.

It is settled law that fiscal institutions chartered by Congress, such as the National Bank for Cooperatives, are exempt from state taxation in the absence of Congressional authorization to tax. In *First Agricultural National Bank of Berkshire County v. State Tax Commission*, 392 U.S. 339 (1968), this Court considered the liability of a national bank for Massachusetts sales tax. The Court stated:

> A long line of subsequent decisions by this Court has firmly established the proposition that the States are without power, unless authorized by Congress, to tax federally created, or, as they are presently called, national, banks. *Owensboro Nat. Bank v. Owensboro*, 173 U.S. 664, 668; *Des Moines Nat. Bank v. Fairweather*, 263 U.S. 103, 106; *First Nat. Bank v. Hartford*, 273 U.S. 548, 550; *Iowa-Des Moines Nat. Bank v. Bennett*, 284 U.S. 239, 244. As recently as 1966, Mr. Justice Fortas, speaking for a unanimous Court,

thought this ancient principle so well established that he used national banks as an example in holding the American Red Cross immune from state taxation:

> "In those respects in which the Red Cross differs from the usual government agency – e.g., in that its employees are not employees of the United States, and that government officials do not direct its everyday affairs – the Red Cross is like other institutions – e.g., *national banks* – whose status as tax-immune instrumentalities of the United States is beyond dispute." *Department of Employment v. United States*, 385 U.S. 355, 360. (Emphasis added.)

392 U.S. at 340-341. While the Court did not readdress the question of whether national banks are federal instrumentalities, the Court did conclude that Congress had not authorized Massachusetts to impose the taxes in question.

In *United States v. State Tax Commission*, 481 F.2d 963 (1st Cir. 1973), Judge Levin Campbell of the Court of Appeals for the First Circuit considered the state taxability of federal savings and loan associations. The court stated:

> It is true that the federal associations, being federal instrumentalities, are immune from state taxation by virtue of the Supremacy Clause, absent specific Congressional authorization. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819); *Agricultural Bank v. Tax Comm'n, supra*, 392 U.S. 339, 88 S. Ct. 2173, 20 L.Ed.2d 1138.

481 F.2d at 969. In *Federal Land Bank of Wichita v. Board of County Commissioners*, 788 F.2d 1440 (10th Cir. 1986), the Court of Appeals for the Tenth Circuit considered the state taxability of federal land banks which, like production credit associations, are member institutions of the Farm Credit System. The court stated:

> A state cannot tax a federal instrumentality absent permissive federal legislation. *First Agricultural National Bank v. State Tax Commission*, 392 U.S. 339, 340, 88 S.Ct. 2173, 2174, 20 L.Ed.2d 1138 (1968).

788 F.2d at 1441. In *United States v. Michigan*, 851 F.2d 803 (6th Cir. 1988), the Court of Appeals for the Sixth Circuit considered the state taxability of federal credit unions. The Court stated:

> In the famous case of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819), the Supreme Court established the doctrine of federal immunity from state taxation. In that case, the Court held that, absent Congressional consent, the federal government and its instrumentalities are immune from state taxation under the Supremacy Clause of the Constitution.

851 F.2d at 805.

The federal and state courts and state tax tribunals which have considered the state taxability of Farm Credit System institutions have uniformly agreed that such entities are exempt from state tax in the absence of Congressional authorization. These courts and tribunals have also uniformly agreed with the Missouri Supreme Court that Congress did not authorize state taxation of the affected

Farm Credit System institutions after 1985. These decisions include:

Farm Credit Services of Central Arkansas v. Arkansas, 76 F.3d 961 (8th Cir. 1996), *rev'd on other grounds*, 520 U.S. 821 (1997)

Arkansas v. Farm Credit Services of Central Arkansas, 994 S.W.2d 453 (Ark. 1999), *cert. denied*, 120 S. Ct. 1530 (2000)

Production Credit Association of Southeastern Missouri, et al. v. Director of Revenue, 10 S.W.3d 142 (Mo. 2000)

Northwest Louisiana Production Credit Association v. State of Louisiana, Department of Revenue and Taxation, 746 So.2d 280 (La. Ct. App. 1999)

Farm Credit Services of Mid-America v. Department of State Revenue, 677 N.E.2d 645 (Ind. Tax 1997), *review denied*, 690 N.E.2d 1186 (Ind. 1997)

Farm Credit Services of Mid-America v. Department of State Revenue, 705 N.E.2d 1089 (Ind. Tax 1999), *review granted*, Dkt. No. 49S10-9908-TA-453 (Ind. 1999)

Appeal of Farm Credit Services of Central Kansas, et al., Dkt. Nos. 1998-2839-DT through 1998-2845-DT (Kan. Bd. Tax App. 1999)

Utah Production Credit Association v. Auditing Division of the Utah State Tax Commission, App. Nos. 97-0425 and 99-015 (Utah State Tax Comm. 1999)[3]

---

[3] Cases involving the tax exemption for Farm Credit System institutions are currently pending before the Indiana Supreme Court, the Ohio Supreme Court, and the Kansas Court of Appeals. Decisions in these cases are expected in the near future. A number of other states, including Idaho, Minnesota, Mississippi, Montana, Pennsylvania, Tennessee, and Texas have administratively agreed that Farm Credit System institutions are exempt from state income or franchise tax.

III. There is No State Court Conflict Which Warrants This Court's Review

The centerpiece of the petition in this case is a purported conflict between a decision by the New Mexico Court of Appeals in *Production Credit Association of Eastern New Mexico v. Taxation & Revenue Department*, ___ P.2d ___, 2000 WL 300857 (N.M. Ct. App. 2000), *cert. denied*, No. 26,211 (N.M. 2000), and the far greater number of cases which have found Farm Credit System institutions exempt from state taxation. The unusual circumstances of the New Mexico case suggest that it will not be followed by other courts. Thus, there is no conflict which warrants this Court's review.

On the main legal points, the decision of the New Mexico Court of Appeals is fully consistent with the analysis of the Missouri Supreme Court and the other courts which have considered the taxability of Farm Credit System institutions. The New Mexico court agreed that Production Credit Associations are federal instrumentalities. *Production Credit Association of Eastern New Mexico*, 2000 WL 300857, 3. The court also agreed that Congress must affirmatively authorize states to tax federal instrumentalities. *Id.* at 4. The court, however, concluded that Congress has affirmatively authorized states to tax Production Credit Associations. *Id.* at 8. In reaching this conclusion, the court did not have the benefit of a

complete and accurate recitation of the legislative history regarding the 1985 amendment to 12 U.S.C. Section 2077.[4]

In analyzing the legislative history of the 1985 amendment, the court was told that the change was made to eliminate outdated and surplus language. *Id.* at 6-7. The court was not told of the new federal funding authorized by Congress in 1985. The court was not told that this funding would be provided indirectly through the Capital Corporation. The court was not told that the legislative history clearly establishes that Congress amended 12 U.S.C. Section 2077 and withdrew state authorization to tax Production Credit Associations specifically because of this new indirect federal funding.[5]

Having been mistakenly persuaded that Congress intended to make only a technical change in Section 2077, the court then faced a dilemma. Congress had clearly repealed the states' authorization to tax Production Credit Associations. As the court admitted:

> We agree with the courts that if we looked at the law only at the time when PCA was taxed, PCA would be entitled to a refund for the 1992-1996 tax years because the 1985 Act is silent on the issue of state income taxation.

---

[4] The language and history on Section 2134 (dealing with banks for cooperatives) and Section 2077 (dealing with Production Credit Associations), and the 1985 amendments to such sections, are substantially identical. Respondent agrees with petitioner that these sections should be construed in a similar manner.

[5] The briefs to the New Mexico Court of Appeals have been lodged with the Clerk of this Court. A review of those briefs will disclose a complete absence of information and discussion of this legislative history.

Id. at 8. Not satisfied with this result, the court concluded that the perceived intention of Congress in amending the law should trump what Congress actually did. The court held:

> We must give deference to that intention. *See State v. Herrera*, 86 N.M. 224, 225-26, 522 P.2d 76, 77-78 (1974) (ruling that when a legislative body's perceived legislative intent fails to coincide with a statute's wording, it is the perceived intent, and not the statute's literal language, that we must vindicate).

Id. Respondent submits that if the New Mexico court had been presented with an accurate picture of the reasons for amending 12 U.S.C. Section 2077 in 1985, it would have concluded that both the action and intention of Congress were consistent. The prior grant of authority in Section 2077 permitting states to tax Production Credit Associations was repealed in 1985 because Congress was providing new federal funding to the Farm Credit System.

IV. This Case Impacts Only a Handful of Farm Credit System Institutions

This case involves only the proper construction of 12 U.S.C. Section 2134 (district banks for cooperatives and the Central Bank for Cooperatives) and 12 U.S.C. Section 2077 (Production Credit Associations). No constitutional or statutory issue is presented which will affect entities outside the Farm Credit System. The Court should

decline to review this case because of its limited importance.

CONCLUSION

If the Court is inclined to consider and decide the issue of state taxability of the National Bank for Cooperatives (and Production Credit Associations), it should wait until other state courts decide their pending cases. This will permit the Court to determine whether there is a true conflict in the state courts. If the other courts agree with the Missouri and Arkansas Supreme Courts, the overwhelming state court consensus on this issue will obviate the need for this Court's review.

For the reasons stated, the Court should deny the petition for writ of certiorari.

Respectfully submitted,

RICHARD A. HANSON
(Counsel of Record)
THEODORE R. BOTS
McDERMOTT, WILL & EMERY
227 West Monroe Street
Chicago, Illinois 60606
(312) 984-7799

No. 99-1792

In the
SUPREME COURT OF THE UNITED STATES

DIRECTOR OF REVENUE,

Petitioner,

v.

COBANK ACB, AS SUCCESSOR TO THE NATIONAL BANK FOR COOPERATIVES,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Missouri

REPLY BRIEF FOR PETITIONER

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri

JAMES R. LAYTON
State Solicitor
Counsel of Record
Jefferson City, MO 65102
(573) 751-3321
Counsel for Petitioner

ARGUMENT

1. According to CoBank, the conflict between the Missouri and New Mexico decisions is merely as to the proper interpretation of the language in 12 U.S.C. §§ 2077 and 2134. Thus CoBank points to the absence of any discussion in the New Mexico appellate briefs of the legislative history of the 1985 amendments. That argument ignores the deeper and broader-reaching conflict discussed in the petition.

Under the Missouri court's reading of this Court's precedents, CoBank's citation to the legislative history is irrelevant. The question, in Missouri, is not what Congress *intended to do*, but merely what Congress *said in the statute*. Thus the Missouri court did not have to look in the legislative history -- or even in logic -- to explain why Congress would abruptly move from having production credit associations and banks for cooperatives pay all state and local taxes, to having them pay none.

CoBank might have a better argument that legislative history was relevant under the rule applied by the New Mexico court. Under that rule, the court can look beyond the mere words of the statute. But the absence of a discussion of legislative history in the New Mexico decision cannot be attributed just to the scope of the parties' briefs and arguments. The New Mexico court held that rules of statutory construction can be used to determine whether Congress has authorized taxation -- not that the standards for tax immunity waivers set by this Court could be met through language in a congressional committee's report.

Again, it is in the ability of the courts to resort to rules of construction that the Missouri and New Mexico courts differ. They agree that as to the imposition of state

and local taxes, the language now found in § 2134 is silent. And though they "agreed that Congress must affirmatively authorize states to tax federal instrumentalities" such as CoBank (Brief in Opposition at 13), the courts' differing conclusions as to whether Congress can "affirmatively authorize" taxation by replacing an express waiver of immunity with silence cannot be reconciled. CoBank does not even try.

2. Even if the legislative history of the 1985 amendment were relevant, it is not so "clear" as CoBank suggests. The committee report they cite speaks of "technical and conforming" changes, without identifying which change falls into which category -- and certainly without intimating that any of the changes are independently significant, as an end to state and local taxation of production credit associations and banks for cooperatives would certainly be. The tie CoBank asserts between a particular phrase in the report and a particular line in the bill is CoBank's invention; it is neither apparent in nor compelled by the language of the report. Notably, CoBank fails to provide any explanation either for the broad change it argues that Congress made, or for hiding it in a list of "technical and conforming" amendments.

We do not know why CoBank omitted such an explanation from its brief in opposition. But the reason for its omission from briefs and arguments to the Missouri Supreme Court is apparent: CoBank argued that the court need look no further than the express language of the statute to define the scope of tax immunity, thus making an explanation unnecessary and irrelevant. The Missouri court accepted that argument; the New Mexico court rejected it.

3. CoBank closes by asserting that the dispute between the New Mexico and Missouri decisions has limited impact. That argument ignores three points. First, CoBank (like

production credit associations) operates in all fifty states and competes with other financial institutions, both federally and state-chartered, that do not share the immunity it claims. Second, the holdings in Missouri and New Mexico will be applied to other taxes; if there remains a basis, under the Missouri holding, for states to impose other taxes, it is not evident in CoBank's argument. And third, the difference between the Missouri court's holding (affirmative authorization only by express language) and the New Mexico court's holding (affirmative authorization through statutory construction) has implications for all federal instrumentalities, not just for these two elements of the Farm Credit System.

CONCLUSION

For the reasons stated above and in the petition, the Court should grant the petition and resolve the conflict as to whether Congress, by repealing merely a portion of a federal instrumentality's express exemption from tax, expands that exemption.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

James R. Layton
State Solicitor
Counsel of Record
P.O. Box 899
Jefferson City, MO 65102
(573) 751-3321

Counsel for Petitioner

Supreme Court, U.S.
FILED
JUN - 6 2000
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

(4)

No. 99-1792

DIRECTOR OF REVENUE, STATE OF MISSOURI,
Petitioner,

v.

COBANK ACB, AS SUCCESSOR TO THE NATIONAL BANK FOR COOPERATIVES,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

BRIEF AMICUS CURIAE OF OHIO, FLORIDA, ILLINOIS, LOUISIANA, MARYLAND, MONTANA, NEBRASKA, NEW YORK, NORTH DAKOTA, SOUTH DAKOTA, AND VERMONT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

BETTY D. MONTGOMERY
Attorney General of Ohio
EDWARD B. FOLEY
State Solicitor
ROBERT C. MAIER*
Assistant Solicitor
*Counsel of Record
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-8980

2206

ROBERT A.
BUTTERWORTH
Attorney General
State of Florida

JAMES E. RYAN
Attorney General
State of Illinois

RICHARD P. IEYOUB
Attorney General
State of Louisiana

J. JOSEPH CURRAN, JR.
Attorney General
State of Maryland

JOSEPH P. MAZUREK
Attorney General
State of Montana

DON STENBERG
Attorney General
State of Nebraska

ELIOT SPITZER
Attorney General
State of New York

HEIDI HEITKAMP
Attorney General
State of North Dakota

MARK BARNETT
Attorney General
State of South Dakota

WILLIAM H. SORRELL
Attorney General
State of Vermont

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

STATEMENT OF AMICUS INTEREST AND SUMMARY OF ARGUMENT 1

REASONS FOR GRANTING THE WRIT 5

A. The Court Has Already Determined That, As To Production Credit Associations ("PCAs"), The Immunity Issue Presented Here Is Worthy of Review. Inasmuch As The 'Banks for Cooperatives' Immunity Statute Is Identical To .The PCA Immunity Statute, The Same Reasons For Granting Certiorari Apply Here, And Those Reasons Have Not Diminished Since 1997 But Rather Increased 5

B. This Case Presents An Excellent Vehicle To Articulate The Overarching Principle That The Tax Immunity Of All Institutions Chartered Under The Farm Credit Act of 1971, As Amended, Turns Not On A Judicial Doctrine Of Inherent Intergovernmental Immunity, But Solely On The Extent To Which The Act Itself, Either By Expression Or By Implication, Confers Immunity. That Principle Will Become Applicable In A Large Number Of Immunity Claims By Farm Credit System Entities 10

CONCLUSION 16

TABLE OF AUTHORITIES

PAGE

CASES:

Arkansas v. Farm Credit Services of Central Arkansas,
520 U.S. 821 (1997) .....passim

Arkansas v. Farm Credit Services of Central Arkansas,
519 U.S. 1085 (1997).....2, 6

Baker PCA v. State Tax Commission,
421 P.2d 984 (Ore. 1966) 7

Columbus PCA v. Bowers,
180 N.E.2d 1 (Ohio 1962) 7

Department of Employment v. United States,
385 U.S. 355 (1966).....13

In re Farm Credit of Western New York ACA,
Nos. 816576, 816604, 816605, 816606,
2000 N.Y. Tax LEXIS 7 (Jan. 13, 2000).....8

Farm Credit Services v. Arkansas,
76 F.3d 961 (8th Cir. 1996) 5

Farm Credit Services of Mid-America v.
Department of State Revenue,
705 N.E.2d 1089 (Ind. Tax Ct. 1999).....12

First Agricultural National Bank v. State Tax Commission,
392 U.S. 339 (1968).....14

Kern-Limerick, Inc. v. Scurlock,
347 U.S. 110 (1954).....14, 15

McCulloch v. Maryland,
17 U.S. 316 (4 Wheat.) 316 (1819) 2, 5, 12, 13

Northwest Louisiana PCA v. State,
746 So.2d 280 (La. App. 1999) 12

PCA of Eastern N.M. v. Taxation and Revenue Dep't,
No. 20,078, 2000 N.M. App. LEXIS 8 (Feb. 1, 2000)
review denied 997 P.2d 820 (N.M., March 13, 2000) 6, 7

State v. Farm Credit Services of Central Arkansas,
994 S.W.2d 453 (Ark. 1999) 6

United States v. County of Allegheny,
322 U.S. 174 (1944).....15

United States v. Mississippi Tax Commission,
421 U.S. 599 (1975).....13, 14

Woodland PCA v. Franchise Tax Board,
.37 Cal.Rptr. 231 (App. 1964) 7

STATUTES:

12 U.S.C. 2071 10

12 U.S.C. 2077 .....5, 10

12 U.S.C. 2134 .....5, 9, 10, 13

12 U.S.C. 2141 10

Agricultural Credit Act of 1987, Pub.L. No. 100-233,
§805(j) and (p), 101 Stat. 1568, 1715-16 (1988).....3

Farm Credit Act of 1933, ch. 98, §63,
48 Stat. 257, 267 (1933) 3

Farm Credit Act of 1971, Pub.L. No. 92-181, §§2.17, 3.13, 85 Stat. 583, 602, 608 (1971) 3

Farm Credit Amendments Act of 1985, Pub.L. No. 99-205, §§205(e)(16), (e)(10), 99 Stat. 1678, 1705 (1985) 3

IN THE SUPREME COURT OF THE UNITED STATES

No. 99-1792

DIRECTOR OF REVENUE, STATE OF MISSOURI,
Petitioner,

v.

COBANK ACB, AS SUCCESSOR TO THE NATIONAL BANK FOR COOPERATIVES ,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

BRIEF AMICUS CURIAE OF OHIO, FLORIDA, ILLINOIS, LOUISIANA, MARYLAND, MONTANA, NEBRASKA, NEW YORK, NORTH DAKOTA, SOUTH DAKOTA, AND VERMONT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STATEMENT OF AMICUS INTEREST AND SUMMARY OF ARGUMENT

Ohio and ten other states support the Missouri Director of Revenue's petition for certiorari and urge the Court to reverse the decision of the Missouri Supreme Court. At issue is the scope of immunity from State and local taxation enjoyed by a certain federally chartered lending institution within the Farm Credit System, the National Bank for Cooperatives ("NBC"). (A reorganization occurred *after* the tax years at issue which merged the NBC into what is

now CoBank, ACB, another specially chartered Farm Credit System entity. That merger involved "unlike" entities with differing levels of statutorily prescribed tax immunity. During the tax years at issue, however, the institution's immunity status must be determined as a "bank for cooperatives.") The case presents the question whether the NBC, as a "federal instrumentality," should be granted intergovernmental tax immunities beyond those immunities which Congress expressly provided by statute. Stated more formally, the question is: Whether the Farm Credit Act of 1971, as amended, permits courts to apply the judicial doctrine of intergovernmental tax immunity from *McCulloch v. Maryland* to confer state income-tax immunity on a bank chartered under the Act, where the Act itself explicitly confers a more limited immunity that by its plain terms does not encompass immunity from state income taxes.

The question is not new to this Court, though it comes in new packaging. In this case, the Farm Credit System lender that claims immunity is the NBC; last time, it was a different Farm Credit System entity, the production credit association ("PCA"). At the urging of the States and the Solicitor General, the Court in 1997 granted certiorari over the question of intergovernmental tax immunity of PCAs, while simultaneously granting certiorari over a threshold jurisdictional question. *Arkansas v. Farm Credit Services of Central Arkansas*, 519 U.S. 1085 (1997) (granting certiorari); *see also same case* 520 U.S. 821, 824-25 (opinion of the Court per Kennedy, J.) (discussing posture of the case and noting that "[e]ntitlement to the immunity is the underlying substantive issue, were we to reach it"). (The Missouri Supreme Court decision in this case addresses immunity of PCAs as well as the NBC, and came to the same conclusion that Arkansas challenged in 1997 before this Court; but on account of a prior arrangement between the Director and the PCAs only the NBC aspect of the case is the subject of the petition for certiorari here.)

It is crucial to note that, although the NBC in this case is certainly a different institution from the PCAs in the prior case, the statutory provision addressing the tax immunities of the "banks for cooperatives" is, in history and language, verbatim the same statutory provision that addresses the tax immunities of PCAs. In fact, in the 1933 legislation that first provided for the chartering of both PCAs and banks for cooperatives, both institutions were treated as part of the very same immunity statute. Farm Credit Act of 1933, ch. 98, §63, 48 Stat. 257, 267 (1933).

In the Farm Credit Act of 1971, which amalgamated and re-codified previously distinct pieces of Farm Credit System legislation, the joint immunity provision was divided in parts, so that the portion of the 1971 Act devoted to PCAs contained its own tax immunity provision; and the portion of the 1971 Act devoted to banks for cooperatives contained its own tax immunity provision. Farm Credit Act of 1971, Pub. L. 92-181, §§2.17, 3.13, 85 Stat. 583, 602, 608 (1971). But the provisions, though divided, continued to contain (apart from the name of the institution) verbatim the same language. Then, in 1985, both tax immunity provisions were amended by deletion of the very same passages – in each case the last two sentences – so that (apart of course from the name of the institution) the two immunity provisions contained the same language verbatim both before and after the 1985 amendment. Farm Credit Amendments Act of 1985, Pub. L. 99-205, §§205(e)(16), (e)(10), 99 Stat. 1678, 1705 (1985). Finally, in the Agricultural Credit Act of 1987, which enacted comprehensive amendments to the Farm Credit Act of 1971, certain technical amendments added the language "except that interest on such obligations shall be subject to Federal income taxation in the hands of the holder" at the end of both the PCA and the banks for cooperatives immunity statutes. Agricultural Credit Act of 1987, Pub. L. No. 100-233, §805(j) and (p), 101 Stat. 1568, 1715-16 (1988).

Thus, the immunity question in this case is the same immunity question as that presented by the PCAs. It poses the same situation of a lower court applying broad immunity under a judicially-created immunity doctrine despite express statutory language describing what immunities should be recognized.

Ultimately, the Court in the 1997 Arkansas PCA case held the Tax Injunction Act had barred the district court from hearing the case, and for that reason the Court did not reach the merits of whether the lower court had properly granted additional immunities to the PCAs. 520 U.S. 821, 832. Now the immunity question, which the Court in 1997 found worthy of review but did not reach, is presented in the context of the same statutory language, and it comes from the Missouri Supreme Court unencumbered by jurisdictional difficulties. For the same reasons as before, the Court should grant certiorari here.

REASONS FOR GRANTING THE WRIT

A. The Court Has Already Determined That, As To Production Credit Associations ("PCAs"), The Immunity Issue Presented Here Is Worthy of Review. Inasmuch As The 'Banks for Cooperatives' Immunity Statute Is Identical To The PCA Immunity Statute, The Same Reasons For Granting Certiorari Apply Here, And Those Reasons Have Not Diminished Since 1997 But Rather Increased.

Congress proclaimed "banks for cooperatives," like PCAs, to be "federal instrumentalities" and expressly immunized their "notes, debentures and other obligations" from federal, State and local taxation, 12 U.S.C. 2134, compare PCA immunity statute, 12 U.S.C. 2077. But in spite of Congress's enumerated grant of immunities, the Missouri Supreme Court held the NBC (and the PCAs as well) additionally enjoys immunity from State corporate income tax. The Missouri court predicated that result on the doctrine of *McCulloch v. Maryland*, 17 U.S. 316 (4 Wheat.) (1819). That result parallels what two judges of a three-judge panel of the Eighth Circuit held as to the PCAs in the 1997 Arkansas case, 76 F.3d 961 (1996). From the Eighth Circuit's decision, Arkansas petitioned for certiorari. It received support from Ohio and 12 other States.

In response to that petition, the Court sought the view of the Solicitor General, who complied by filing a brief that agreed with the States both that certiorari should be granted on this issue and that PCAs were not immune from state taxation. Accordingly, in addition to pointing out that the Tax Injunction Act had barred jurisdiction in the federal district court, the Solicitor General specifically asserted that the Eighth Circuit decision "construes the Farm Credit Act of 1971, 12 U.S.C. 2077, in a manner that calls into question

long-standing impositions of state taxes on production credit associations in which the federal government does not have an ownership interest." U.S. Brief (On Petition For Writ of Certiorari), No. 95-1918, at 7.[1]

Certiorari was then granted over the merits issues, 519 U.S. 1085 (1997), with the Court additionally requiring the parties to brief and argue the Tax Injunction Act question. Ultimately, the Court reversed on the grounds that the Tax Injunction Act barred federal jurisdiction, 520 U.S. 821, and thereby did not reach the substantive issue of tax immunity. Thereafter, the PCAs pursued their refund claims in Arkansas state courts. When the Arkansas Supreme Court eventually ruled in favor of the PCAs, *State v. Farm Credit Servs. Of Central-Arkansas*, 994 S.W.2d 453 (Ark. 1999), Arkansas again petitioned for certiorari, No. 99-993. Ohio and 14 other states supported the petition.

The Court denied certiorari on March 27, 2000, 120 S.Ct. 1530, but the docket in the case indicates some concern about the Arkansas revenue counsel's authority to file the petition in this Court without involvement by Arkansas's Attorney General. That concern, a state-law issue unique to that case, does not diminish the ongoing importance of the federal-law question of immunity of Farm Credit System entities. Indeed, the conflict among lower courts has deepened since Arkansas filed its latter petition: the New Mexico appellate court properly concluded that PCA immunity is indeed limited to what the statute by its terms confers. *PCA of Eastern N.M. v. Taxation and Revenue Dep't*, No. 20,078, 2000 N.M. App. LEXIS 8 (Feb. 1, 2000), *review denied*, 997 P.2d 820 (N.M. March 13, 2000).

[1] Citations to the U.S. brief in Case No. 95-1918 are to the brief submitted at the petition stage. The Solicitor General also filed a brief on the merits in support of Arkansas's position.

Now presented in the proper posture of a state court decision, the tax immunity issue is ripe for review by this Court. The reasons for granting certiorari remain compelling.

- The Missouri Supreme Court opinion manifests the same error as the Eighth Circuit decision in 1996 and the Arkansas Supreme Court decision in 1999. As a result, the very same conflict arises between the Missouri Supreme Court's decision and the judgments of courts in other States as the Eighth Circuit's decision created in the prior case. Most recent is the conflict with the New Mexico appellate court's disposition of PCA immunity in *PCA of Eastern N.M. v. Taxation and Revenue Dep't*, No. 20,078, 2000 N.M. App. LEXIS 8 (Feb. 1, 2000), *review denied*, 997 P.2d 820 (N.M. March 13, 2000). *See also, Columbus PCA v. Bowers*, 180 N.E.2d 1 (Ohio 1962) (statutory language conditioning broad tax immunity on government ownership constituted express consent to state corporate franchise taxation once all shares were in private hands); *Woodland PCA v. Franchise Tax Board*, 37 Cal. Rptr. 231 (App. 1964) (PCA's franchise subject to state taxation once PCA shares were all privately owned despite congressional declaration that PCA franchise is "federal instrumentality"). *Accord Baker PCA v. State Tax Comm'n*, 421 P.2d 984, 987 (Ore. 1966) (PCA conceded that "PCAs became subject to state taxation

whenever the government ownership of the stock was terminated").[2]

- The monetary stakes for the States have only increased in the interim. In seven (7) responding states, a partial and cursory survey reveals currently pending refund or reassessment claims involving PCAs or other Farm Credit System entities amounting to no less than sixteen million (16,000,000) tax dollars at issue.

- No action by Congress in the interim has clarified or altered the issues.

- Beyond the impact on State and local finances, the issue retains additional importance arising from the distortion of the competitive lending market. Special, extra-statutory tax breaks for Farm Credit System players mean an uneven playing field among themselves and with respect to competitors in the agricultural lending sector. At the merits stage in the prior case, the brief of Amicus American Bankers' Association *et al.* highlighted this significant aspect of the issue.

- In its brief in opposition, respondent contrasts this "bank for cooperatives" case with PCA cases, asserting at page 7 that "because this case involves only the question of the proper construction of Section 2134, it impacts a small number of Farm Credit System entities" and at page 8 that no "broader statutory or constitutional questions" are presented. But the roll call of recent decisions at page 12 of respondent's brief refutes those assertions; it shows burgeoning litigation involving Farm Credit System entities throughout the Nation that cries out for this Court to clarify that the statutes completely define the scope of immunity.

Because the Missouri Supreme Court decision stands in conflict with other lower court decisions and presents the appropriate case to address an issue that retains its national importance, the Court should follow its prior decision to grant certiorari over the same immunity issue that was presented in the 1997 Arkansas PCA case.

---

[2] These cases reflect what the Solicitor General in the 1997 Arkansas case justly called the "long-standing impositions of state taxes on production credit associations," but the erroneous reasoning of the Eighth Circuit in the last case and the Missouri Supreme Court in this case appears to be infectious: respondent at page 12 cites a number of decisions that have misconstrued the Court's precedents in the same way as did the Missouri court in this case. On the other hand, a New York State administrative tribunal recently reaffirmed that the business inherited from a PCA by a merged Farm Credit System entity is subject to the State's franchise tax. *In re Farm Credit of Western New York ACA*, Nos. 816576, 816604, 816605, 816606, 2000 N.Y. Tax LEXIS 7 (Jan. 13, 2000).

B. This Case Presents An Excellent Vehicle To Articulate The Overarching Principle That The Tax Immunity Of All Institutions Chartered Under The Farm Credit Act of 1971, As Amended, Turns Not On A Judicial Doctrine Of Inherent Intergovernmental Immunity, But Solely On The Extent To Which The Act Itself, Either By Expression Or By Implication, Confers Immunity. That Principle Will Become Applicable In A Large Number Of Tax Immunity Claims By Farm Credit System Entities.

The Missouri Supreme Court employed the same erroneous analysis that two of the Eighth Circuit judges adopted in the 1997 Arkansas case. Namely, the state court looked at Congress's designation of both PCAs and the NBC as "federal instrumentalities" at 12 U.S.C. 2071, 2141, and found that such status conferred broad tax immunity absent an express "waiver" by Congress. The state court adopted this theory in spite of the express grant of more limited immunity to the notes, obligations and debentures of PCAs and the NBC that immediately follows the instrumentality designation in both 12 U.S.C. 2071, 2077 (PCAs) and 12 U.S.C. 2141, 2134 (banks for cooperatives).

Just as troubling as the result itself is the absence in the Missouri Supreme Court's opinion of any explanation about, or attempted refutation of, the objections and concerns raised by the States, by the Solicitor General, and by the non-PCA bankers in the last case. Specifically, the Missouri Supreme Court failed to explain why the doctrine of *expressio unius* should not apply to limit tax immunities to those mentioned and explicitly conferred by Congress. Nor did the lower court offer any reason to disregard the unbroken legislative history that the reduction of tax immunities always accompanied the complete privatization of both PCAs and banks for cooperatives. Pet. at 8-11; U.S.

Brief (On Petition for Writ of Certiorari), No. 95-1918, at 2-4. In light of this Court's observations last time that "[t]he PCAs' business is making commercial loans," and that PCAs' "interests are not coterminous with those of the Government any more than most commercial interests," 520 U.S. at 831 – observations that could fairly be made of "banks for cooperatives" as well[3] – the state court ought to have explained why such factors should be disregarded in deciding the scope of intergovernmental tax immunity.

Perhaps most startling of all, however, is the apparent misappreciation the Missouri Supreme Court showed toward the statutory analysis this Court utilized in the 1997 Arkansas case. That analysis would, if applied to the tax immunity question, strongly militate to the contrary result to that reached below. In the prior case, this Court decided that the PCAs, "[d]espite their formal and undoubted designation as instrumentalities of the United States," did not "have or exercise power analogous to that of the NLRB or any of the departments or regulatory agencies of the United States." 520 U.S. at 831-32. That sufficed for the Court to "conclude that instrumentality status does not in and of itself entitle an entity to the same exemption the United States has under the Tax Injunction Act." *Id.* The course of the Court's analysis in this regard included explicit reference to tax immunities as well:

> The tax immunity a PCA has under §2077 is a permitted consequence of its status as a federal instrumentality. An instrumentality of the United States can enjoy the benefits and immunities conferred by explicit statutes, however, without the

[3] Although the NBC lent to cooperative associations rather than individual farmers, its own purposes and objectives do not substantively differ from those of PCAs.

> further inference that the instrumentality has all the rights and privileges of the National Government.

520 U.S. at 829.

Yet, in spite of the relevance of this analysis for applying to the tax immunity question principles similar to those governing jurisdiction under the Tax Injunction Act, the Missouri Supreme Court offered absolutely no explanation why this Court's statutory analysis would not apply to the immunity question also. As the most recent and direct statement (albeit dicta) touching on tax immunity of instrumentalities, closer attention was surely due to the *Farm Credit* decision.[4]

---

[4] The Missouri Supreme Court mentioned this Court's 1997 *Farm Credit* decision only once, Pet. App. at A-3, where it was referenced only as subsequent history to the Eighth Circuit decision under the rubric "reversed on other grounds." There was no further discussion of *Farm Credit*'s having any relevance. The Missouri Supreme Court did cite *Farm Credit Services of Mid-America v. Dep't of State Revenue*, 705 N.E.2d 1089 (Ind. Tax Ct. 1999), a case where a state tax court declined to extend this Court's statutory analysis in *Farm Credit* to determining the tax immunity of a Farm Credit System entity (not a PCA), primarily on the grounds that it thought doing so would require overruling *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). 705 N.E.2d at 1093. But that is not so, as noted below; in *McCulloch* there was no immunity statute. The other state court cases, *State v. Farm Credit Services of Central Arkansas*, 994 S.W.2d 453 (Ark. 1999), cert. denied, 120 S.Ct. 1530 (Mar. 27, 2000); and *Northwest Louisiana PCA v. State*, 746 So.2d 280 (La. App. 1999) simply manifest the same error committed by the Missouri Supreme Court but engage in no analysis regarding the genuine significance of this Court's reasoning in the 1997 Arkansas case.

Nor does the state court's reliance on *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) adequately respond to the Court's reasoning in *Farm Credit*. That is so, because *McCulloch* involved bank legislation that made no mention of state tax immunity one way or the other. Thus, *McCulloch* does not teach us whether or not a statute that *does* address immunity permits judicial implication of further immunities beyond those legislatively conferred – and why Congress's explicit enumeration of tax immunities for "banks for cooperatives" at 12 U.S.C. 2134 should not be deemed exclusive.

The Missouri court cites to other decisions of this Court that are equally unconducive to its conclusion. **First**, *Department of Employment v. United States*, 385 U.S. 355 (1966), held only that certain Internal Revenue Code provisions that exempted "federal instrumentalities" from state unemployment taxes applied to the National Red Cross. The fact that *Department of Employment* applied a statutory immunity which Congress explicitly conferred upon certain "instrumentalities of the United States" is easily overlooked. The discussion of the statutes is consigned to the last paragraph of the opinion, which examines the effect of a 1960 amendment to those statutes. The Court concluded that service performed for certain "instrumentalities of the United States" was intended to be exempt from state as well as federal employment taxes; in accordance with this reading of the statutes the bulk of the opinion focuses on whether the Red Cross was such an "instrumentality" for purposes of applying the statutory exemption. Nothing in the holding of *Department of Employment* endorses judicial grants of immunity beyond what the statutes confer.

Second, *United States v. Mississippi Tax Comm'n*, 421 U.S. 599 (1975), involved the imposition of sales taxes on liquor sales to post exchanges, officers' clubs, ship's stores, and "other nonappropriated fund activities" on

military bases, 421 U.S. at 606, which without difficulty the Court understood to be a tax directly on the United States. That situation radically differs from the approach the Court endorsed in the 1997 Arkansas case to federally chartered but privately held lenders; where, as with the PCAs there and the banks for cooperatives here, the lender's "business is making commercial loans, and all their stock is owned by private entities," the interest of federally chartered institutions "are not coterminous with those of the Government any more than most commercial interests." 520 U.S. 821, 831. Accordingly, "[a]n instrumentality of the United States can enjoy the benefits and immunities conferred by explicit statutes [] without the further inference that the instrumentality has all of the rights and privileges of the National Government." 520 U.S. at 829.

Third, *First Agricultural Nat'l Bank v. State Tax Comm'n*, 392 U.S. 339 (1966), did not at all rely upon a general, judicially implied intergovernmental tax immunity that can only be waived by explicit provision of Congress, but instead placed exclusive reliance on the history of the passage and application of the tax immunity statute. In finding immunity, the Court declined to "change what legislative history and prior decisions have established is the precise meaning of an Act of Congress," and held that "[b]ecause of §548 and its legislative history, we are convinced that if a change is to be made in state taxation of national banks, it must come from the Congress..." 392 U.S. at 345, 346. That approach is consistent with the one favored by the States in this case, not that favored by the respondent and the Missouri court.

Fourth, *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110 (1954), similarly involved imposition of a sales tax on purchases made on behalf of the United States Government as part of naval procurement through independent contractors; despite the intervening hand of the contractors as

purchasing agents, the Government was the actual purchaser and the state could not tax it as such. Attempting to apply *Kern-Limerick* here is as inappropriate as attempting to apply *United States v. State Tax Comm'n* in light of the doctrine and dicta in the 1997 Arkansas case.

Fifth, *United States v. County of Allegheny*, 322 U.S. 174 (1944), involved imposition of an *ad valorem* property tax on equipment owned by the United States but operated at a private facility; no tax could be imposed on the United States' interest in the property. Federal, not state, law determined whether the United States "owned" the property under the arrangements with its contractor. That holding plainly says nothing about the liability of a federally chartered but privately held lender for state corporate income tax.

In no way can the Missouri Supreme Court be said to have advanced the analysis of tax immunity past the point of the Eighth Circuit panel majority in the 1997 Arkansas PCA case. That clarification needs to be supplied by this Court just as much now as in 1997, when certiorari was granted over the PCA immunity issue where the same statutory immunity language was implicated. This time, the question is fully ripe for disposition by this Court.

CONCLUSION

For all the foregoing reasons, the writ of certiorari should be granted and the decision of the Missouri Supreme Court should be reversed.

Respectfully submitted,

BETTY D. MONTGOMERY
Attorney General of Ohio

EDWARD B. FOLEY
State Solicitor
ROBERT C. MAIER*
Assistant Solicitor
*Counsel of Record
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-8980

June 8, 2000

Supreme Court, U.S.
FILED
AUG 25 2000
CLERK

(b)

No. 99-1792

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2000

DIRECTOR OF REVENUE OF MISSOURI, *Petitioner*,

v.

COBANK, ACB, *Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

JOINT APPENDIX

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri
JAMES R. LAYTON*
State Solicitor
GAIL VASTERLING
DAVID LIEBER
Assistant Attorneys General
P.O. Box 899
Jefferson City, MO 65102
(573) 751-3321
Counsel for Petitioner
* *Counsel of Record*

RICHARD A. HANSON*
THEODORE R. BOTS
McDERMOTT, WIL & EMERY
227 W. Monroe Street
Chicago, IL 60606
(312) 984-7799
Counsel for Respondent

Petition for Certiorari filed: April 24, 2000
Certiorari Granted: June 26, 2000

60pp

TABLE OF CONTENTS

Docket of Missouri Supreme Court A-3

Docket of Administrative Hearing Commission A-4

Complaint, Case No. 98-000716RI A-6

Exhibit A (Charter of National Bank for Cooperatives) A-11

Exhibit B (Notice from Missouri Department of Revenue) A-13

Exhibit C (Decision of Missouri Director of Revenue) A-16

Complaint, Case No. 98-000718RI A-23

Exhibit A (Charter of National Bank for Cooperatives) A-28

Exhibit B (Notice from Missouri Department of Revenue) A-29

Exhibit C (Decision of Missouri Director of Revenue) A-31

Answer of Missouri Director of Revenue (Case No. 98-000716RI) A-38

Answer of Missouri Director of Revenue (Case No. 98-000718RI) A-42

Petitioner CoBank's Answers to Interrogatories A-46

Stipulation of Facts A-54

Attachment (Charter of CoBank, ACB) A-57

Granting of Certiorari, U.S. Supreme Court A-59

NOTE: The decision of the Missouri Supreme Court appears at A-1 of the Petition Appendix. The decision of the Administrative Hearing Commission appears at A-5 of the Petition Appendix.

SUPREME COURT OF MISSOURI

SC81727

COBANK, ACB, AS SUCCESSOR TO THE NATIONAL BANK FOR COOPERATIVES,
APPELLANT
vs.
DIRECTOR OF REVENUE, STATE OF MISSOURI,
RESPONDENT

06-25-99	Petition for Review filed.
07-07-99	Certification of the Record of Proceedings Before the Administrative Hearing Commission (four volumes of legal file).
08-16-99	Appellant's Brief filed.
09-13-99	Respondent's Brief filed.
09-28-99	Appellant's Reply Brief filed.
10-28-99	Case argued and submitted.
11-17-99	Letter from Counsel for Appellant dated November 12, 1999 (with attachments) received.
01-25-00	Opinion: Reversed and Remanded - All Concur.

STATE OF MISSOURI
ADMINISTRATIVE HEARING COMMISSION

98-0718RI CoBank, ACB v. Director of Revenue
98-0716RI

03-13-98 Complaint filed.

04-08-98 Answer filed.

11-19-98 Petitioner's Motion for Summary Determination, Proposed Findings of Fact, Proposed Conclusion of Law and Brief filed.

12-11-98 Copy of Order of First Division of the Chancery Court of Pulaski County, Arkansas filed by Petitioner.

01-19-99 Respondent's Proposed Findings of Fact, Proposed Conclusions of Law and Suggestions in Opposition to Petitioner's Motion for Summary Determination filed.

02-11-99 Petitioner's Motion for Entry of Decision and Order filed.

02-25-99 Respondent's Response to Petitioner's Motion for Entry of Decision and Order filed.

03-03-99 Respondent Secretary of State's Response to Petitioner's Motion for Entry of Decision and Order.

03-11-99 Reply Brief filed by Petitioner.

03-16-99 Respondent's Suggestions in Rebuttal to Petitioner's Reply Brief filed.

04-02-99 Amended Reply Brief filed by Petitioner.

05-05-99 Stipulation of Facts filed by Petitioner.

05-28-99 Order Issued for Parties to Show Cause by 6-4-99 not to Rule on Petitioner's Motion for Summary Determination.

06-28-99 Appealed to Missouri Supreme Court.

BEFORE THE
ADMINISTRATIVE HEARING COMMISSION
STATE OF MISSOURI

CoBank, ACB, as Successor to the National Bank for Cooperatives	)	
Petitioner,	)	
v.	)	Case No. 98-000716RI
Acting Director of the Missouri Department of Revenue,	)	
Respondent.	)	

COMPLAINT

Comes now Petitioner, CoBank, ACB ("CoBank") as successor to the National Bank for Cooperatives ("National") and for its complaint, appealing the final determination of the Respondent upholding the Missouri Department of Revenue's Notice of Adjustment authorizing only a partial refund of Missouri Corporate Income Tax, states as follows:

1. CoBank is an Agricultural Credit Bank organized under the laws of the United States, and a member

institution of the Farm Credit System. CoBank was formed by the consolidation, effective January 1, 1995, of National, the Farm Credit Bank of Springfield and the Springfield Bank for Cooperatives. CoBank is the successor to all rights and obligations of National. CoBank's address is 5500 S. Quebec Street, Greenwood Village, Colorado 80111.

2. Respondent is the Acting Director of the Missouri Department of Revenue ("Department"), and is sued in his official capacity and not individually.

3. The Commission has jurisdiction over this matter pursuant to § 143.651, RSMo. 1994.[1]

4. During the 1994 (the "Audit Period"), National was a member institution of the Farm Credit System, organized under the Act of Congress known as the Farm Credit Act of 1933 (now superseded by the Farm Credit Act of 1987 (12 U.S.C. § 2000 *et seq.*)). Pursuant to 12

---

[1]All statutory references are to the Revised Statutes of Missouri (1994) unless otherwise noted.

U.S.C. § 2141 and National's charter issued by the Credit Administration, National was "a federally chartered instrumentality of the United States." A copy of the charter is attached hereto as Exhibit A.

5. On September 12, 1995, CoBank timely filed a corporate Income Tax Return requesting a refund in the amount of $179,533.00 for tax year 1994.

6. On October 4, 1995, the Department issued a Notice of Adjustment authorizing a partial Corporate Income Tax Refund. A copy of the Notice of Adjustment is attached as Exhibit B.

7. CoBank timely protested the Notice of Adjustment by letter dated October 31, 1995.

8. On February 20, 1998, Respondent issued a final determination denying CoBank's protest of the Department's Notice of Adjustment. A copy of the Respondent's Determination is attached as Exhibit C.

9. Respondent's denial of CoBank's protest is erroneous in that as instrumentalities of the United States, CoBank and National are immune from state taxation, including the Missouri Corporate Income Tax pursuant to the Supremacy Clause of the United States Constitution.

WHEREFORE, based on the foregoing, CoBank respectfully requests the Administrative Hearing Commission to enter an Order finding: (1) that Respondent's denial of Petitioner's protest is erroneous, and (2) that CoBank is entitled to a refund of Corporate Income taxes paid in 1994. Petitioner further prays for such other relief as may be proper including relief under §§ 136.315 and 536.087.

Respectfully submitted,

BRYAN CAVE LLP

Juan D. Keller, #19864
John P. Barrie, #28291
Carole Lewis Iles, #33821
211 North Broadway, Suite 3600
St. Louis, Missouri 63102
Counsel for Petitioner

Of Counsel:

Richard A. Hanson, Esq.
McDermott, Will & Emery
227 West Monroe Street
Chicago, Illinois 60606-5096
(312) 984-7799

EXHIBIT A

FCA
Farm Credit Administration

Charter

NATIONAL BANK FOR COOPERATIVES

The Farm Credit Administration, in accordance with section 3.20 of the Farm Credit Act of 1971, as amended (the Act), hereby charters a bank established pursuant to the merger of the Baltimore Bank for Cooperatives, Columbia Bank for Cooperatives, Louisville Bank for Cooperatives, Jackson Bank for Cooperatives, St. Louis Bank for Cooperatives, Omaha Bank for Cooperatives, Wichita Bank for Cooperatives, Texas Bank for Cooperatives, Sacramento Bank for Cooperatives, Spokane Bank for Cooperatives, and Central Bank for Cooperatives to be known as the National Bank for Cooperatives (the Bank). The principal office location of the Bank shall be in the City of Englewood, County of Arapahoe, State of Colorado. The Bank is an institution of the Farm Credit System and a federally chartered instrumentality. The Bank may offer credit and related services to eligible borrowers located within any territory that may be served by Farm Credit System institutions under the Act and as it may hereafter be amended.

By this Federal charter, the Farm Credit Administration hereby authorized the Bank to exercise all powers conferred on the Bank under the Act and the regulations of the Farm Credit Administration, as they may hereafter be amended.

IN WITNESS WHEREOF, the Acting Chairman of the Farm Credit Administration Board has executed this charter and caused the seal of the Farm Credit Administration to be Affixed hereto this 29th day of December, 1988. This charter shall be effective January 1, 1989.

CHARTER NO. 14

Farm Credit Administration
McLean, Virginia

_____

Marvin R. Duncan
Acting Chairman of the Board

Attest

_____

David A. Hill
Secretary to the Board

EXHIBIT B

MISSOURI DEPARTMENT OF REVENUE
TAX ADMINISTRATION BUREAU
P.O. BOX 700 (314) 751-4541
JEFFERSON CITY, MO 65105-0700

DATE: OCTOBER 04, 1995

NATIONAL BANK FOR COOPERATIVES
MISSOURI TAX I.D.: 13495186
NATIONAL BANK FOR COOPERATIVES
NOTICE NO: 95258210370
PO BOX 5110
BEG TAX YEAR: 01/94
DENVER, CO 80217
REFUND DUE: $32,703.00

MISSOURI CORPORATION INCOME TAX
NOTICE OF ADJUSTMENT

THIS MISSOURI CORPORATION INCOME TAX NOTICE OF ADJUSTMENT FOR THE ABOVE TAXABLE YEAR IS ISSUED FOR THE FOLLOWING REASON(S):

AN ADJUSTMENT WAS MADE TO THE MISSOURI RETURN.

FEDERAL TAXABLE INCOME REPORTED AS $60,469,216.00 WAS ADJUSTED TO $62,176,591.00.

FEDERAL NET OPERATING LOSS CARRY FORWARD REPORTED AS $1,707,375.00 WAS APPROVED AS $.00.

"OVERPAYMENT" REPORTED AS $179,533.00 WAS COMPUTED AS $32,703.00.

MISSOURI TAXABLE INCOME COMPUTED AS $2,349,277.00.

(***SEE PAGE 2 FOR ADDITIONAL ADJUSTMENTS.)

PLEASE COMPARE THE ABOVE FIGURE(S) WITH YOUR RETURN TO SEE WHERE YOUR RETURN WAS ADJUSTED. A REFUND WILL BE ISSUED IN THE AMOUNT OF $32,703.00 WITHOUT ANY FURTHER ACTION ON YOUR PART.
IF YOU DISAGREE WITH THIS NOTICE OF ADJUSTMENT YOU HAVE SIXTY (60) DAYS FROM THE DATE OF THIS NOTICE TO FILE A WRITTEN PROTEST.

PLEASE DIRECT ANY QUESTIONS TO THE TAX ADMINISTRATION BUREAU AT THE ABOVE ADDRESS.

MISSOURI DEPARTMENT OF REVENUE
TAX ADMINISTRATION BUREAU
P.O. BOX 700 (314) 751-4541
JEFFERSON CITY, MO 65105-0700

DATE: OCTOBER 04, 1995

NATIONAL BANK FOR COOPERATIVES
MISSOURI TAX I.D.: 13495186
NATIONAL BANK FOR COOPERATIVES
NOTICE NO: 95258210370

PO BOX 5110
BEG TAX YEAR: 01/94
DENVER, CO 80217
REFUND DUE: $32,703.00

MISSOURI CORPORATION INCOME TAX

PAGE 2 NOTICE OF ADJUSTMENT

(*** ADDITIONAL ADJUSTMENTS ***)

MISSOURI INCOME TAX COMPUTED AS $146,030.00.

REFUND (BEFORE APPLICABLE INTEREST:
REQUESTED FOR $179,533.00 - APPROVED FOR
$32,703.00

EXHIBIT C

MISSOURI DEPARTMENT OF REVENUE

NATIONAL BANK FOR COOPERATIVES)
)
PROTEST OF DENIAL OF CLAIMS FOR REFUND)
CORPORATE INCOME TAX)
)
Final Decision)
)
YEAR: 1994)

FINDINGS OF FACT

National Bank for Cooperatives (hereinafter referred to as "Taxpayer") filed 1994 Missouri Corporate Income tax returns. Taxpayer is a corporation that was formed by the consolidation of the National Bank for Cooperatives, the Farm Credit Bank of Springfield and the Springfield Bank for Cooperatives. Taxpayer filed an application for tax refund/credit requesting a refund of $179,533. The Missouri Department of Revenue (hereinafter referred to as "Department") computed the income tax as $146,830 and

approved a refund for $32,703. Department records indicate that the corporation closed as of December 31, 1994.

Taxpayer filed a timely protest. Taxpayer claimed that under the Supremacy Clause of the United States Constitution, no state may impose tax on a federal instrumentality unless Congress expressly consents to the tax. Taxpayer claims that The National Bank for Cooperatives is a federal instrumentality, and Congress has not consented to the imposition of state tax on these entities. Therefore, the National Bank for Cooperatives is exempt from state taxation, including the income tax of Missouri.

BASIS OF DECISION

Title 12, of the United States Code, regulates banks and banking. Chapter 7 therein governs The Farm Credit Act, which established the Farm Credit Administration in 1933. It has since been repealed and in its place in Chapter 23, the Farm Credit System was established in 1971; to provide equitable and competitive interest rates to eligible

agricultural borrowers. Congress recognized the need for agricultural credit in rural areas, and established the farmer-owned cooperative Farm Credit System.[1] Taxpayer was chartered under 12 U.S.C. § 2141 which states

> (a) Charter--The National Bank for Cooperatives . . . shall be a federally chartered instrumentality of the United States and an institution of the Farm Credit System. (b) Powers -- The consolidated bank and the board of directors of such bank shall have all of the powers, rights, responsibilities, and obligations of the district banks for cooperatives and the Central Bank for Cooperatives and the boards of directors of such banks except as otherwise provided for in this chapter.

Title 12 U.S.C. § 2002 established Farm Credit Banks which are privately owned. 12 U.S.C. § 2142, provides for the board of directors of the bank, citing that the nomination and election of the members of the board of directors of the consolidated bank under this subsection shall be carried out in accordance with regulations issued by the Farm Credit

---

[1]12 U.S.C. § 2001 (1986).

Administration; and 12 U.S.C. § 2013 grants the general corporate powers of the privately-owned farm credit banks.

Taxpayer is a privately chartered and owned Agricultural Credit Bank. The Taxpayer's Charter cites that "The Bank [Taxpayer] is an institution of the Farm Credit System." Further, the Charter cites "the Bank may offer credit and related services to eligible borrowers located within any territory that may be served by Farm Credit System institutions under the Act." The privately chartered and owned Agricultural Credit Bank is not an instrumentality of the United States that has any kind of tax exemption under 12 U.S.C. § 2077. Furthermore, no production credit associations have been owned by the federal government since 1968 that are tax-exempt under 12 U.S.C. § 2077. There is absolutely no authority for the Taxpayer to be exempt from Missouri income tax.

The Charter does cite "The Bank is an institution of the Farm Credit system and a federally chartered

instrumentality." However, the Taxpayer has no governmental regulatory authority and is a private entity. 12 U.S.C. § 2155 sets out the liability of the banks:

United States not liable.

> (1) Each bank of the System shall be fully liable on notes, bonds, debentures, or other obligations issued by it individually and shall be liable for the interest payments on long-term notes, bonds, debentures, or other obligations issued by other banks operating under the same subchapter of this chapter.
>
> . . .
>
> (c) The United States shall not be liable or assume any liability directly or indirectly thereon.

A careful review of Chapter 23 of Title 12 of the Federal Code which regulates banks and banking confirms that the Taxpayer is not exempt from Missouri income tax. In the protest the Taxpayer relied on ***Farm Credit Services of Central Arkansas, PCA, et al. v. State of Arkansas***, 117 S.Ct. 1776 (1997), rev'g 76 F.3d 961 (CA-8, 1996). The Department finds it inapplicable.

Taxpayer has the burden of proof before the Director of Revenue on appeal. Section 143.661, RSMo. Burden of proof on taxpayer, . . .

> In any proceeding before the director of revenue or on appeal under sections 143.011 to 143.996 the burden of proof shall be on the taxpayer . . .

The Taxpayer has not provided any documentation to support the assertions in the protest letter dated October 31, 1995. Taxpayer has not sustained its burden to prove that the Taxpayer is immune from Missouri state income tax.

DECISION

It is the Final Decision of the Director of Revenue upon reconsideration that the denial of refund claim issued to Taxpayer is correct.

If you were adversely affected by this decision, you may appeal to the Administrative Hearing Commission. To appeal, you must file a petition with the Administrative

Hearing Commission within thirty days after the date this decision was mailed or the date it was delivered. whichever date was earlier. If any such petition is sent by registered mail or certified mail, it will be deemed filed on the date it is mailed; if it is sent by any method other than registered mail or certified mail, it will be deemed filed on the date it is received by the commission.

Joyce Hainen Crandon
Legal Counsel

Dated: February 20, 1998

BEFORE THE
ADMINISTRATIVE HEARING COMMISSION
STATE OF MISSOURI

CoBank, ACB, as Successor to the National Bank for Cooperatives	)	
Petitioner,	)	
v.	)	Case No. 98-000718 RI
Acting Director of the Missouri Department of Revenue,	)	
Respondent.	)	

COMPLAINT

Comes now Petitioner, CoBank, ACB ("CoBank") as successor to the National Bank for Cooperatives ("National") and for its complaint, appealing the final determination of the Respondent upholding the Department of Revenue's denial of CoBank's claim for refund of Corporate Income Tax, states as follows:

1. CoBank is an Agricultural Credit Bank organized under the laws of the United States, and a member institute of the Farm Credit System. CoBank was formed by

the consolidation, effective January 1, 1995, of National, the Farm Credit Bank of Springfield and the Springfield Bank for Cooperatives. CoBank is the successor to all rights and obligations of National. CoBank's address is 5500 S. Quebec Street, Greenwood Village, Colorado 80111.

2. Respondent is the Acting Director of the Missouri Department of Revenue ("Department"), and is sued in his official capacity and not individually.

3. The Commission has jurisdiction over this matter pursuant to § 143.651, RSMo. 1994.[1]

4. During the years 1992, 1992 and 1993 (the "Audit Period"), National was a member institution of the Farm Credit System, organized under the Act of Congress known as the Farm Credit Act of 1933 (now superseded by the Farm Credit Act of 1987 (12 U.S.C. § 2000 *et seq.*)). Pursuant to 12 U.S.C. § 2141 and National's charter issued

[1]All statutory references are to the Revised Statutes of Missouri (1994) unless otherwise noted.

by the Credit Administration, National was "a federally chartered instrumentality of the United States." A copy of the charter is attached hereto as Exhibit A.

5. On April 19, 1995, CoBank timely filed an application for Tax Refund/Credit (Form 472A) and Amended corporation Income Tax Returns requesting refunds, totaling $489,938, for tax years 1991 to 1993.

6. On September 28, 1995, the Department of Revenue denied CoBank's refund claims on the grounds that Farm Credit Services of Central Arkansas, PCA v. State of Arkansas, was appealed and had not yet been finalized. A copy of the Department's denial is attached as Exhibit B.

7. CoBank timely protested the Department's refund claim denial by letter dated November 2, 1995.

8. On February 20, 1998, Respondent issued a final determination denying CoBank's protest of the Department's refund claim denial. A copy of the Respondent's Determination is attached as Exhibit C.

9. Respondent's denial of CoBank's refund claim is erroneous in that as instrumentalities of the United States, CoBank and National are immune from state taxation, including the Missouri Corporate Income Tax pursuant to the Supremacy Clause of the United States Constitution.

WHEREFORE, based on the foregoing, CoBank respectfully requests the Administrative Hearing Commission to enter an Order finding: (1) that Respondent's denial of Petitioner's refund claim is void and erroneous, and (2) that CoBank is entitled to a refund of Corporate Income Taxes paid in 1991, 1992 and 1993. Petitioner further prays for such other relief as may be proper including relief under §§ 136.315 and 536.087.

Respectfully submitted,

BRYAN CAVE LLP

Juan D. Keller, #19864
John P. Barrie, #28291

Carole Lewis Iles, #33821
211 North Broadway,
Suite 3600
St. Louis, Missouri 63102
(314) 259-2000

Counsel for Petitioner

Of Counsel:

Richard A. Hanson, Esq.
McDermott, Will & Emery
227 West Monroe Street
Chicago, Illinois 60606-5096
(312) 984-7799

EXHIBIT A

[Same as Exhibit A to Complaint #98-000716RI. App. A-11]

EXHIBIT B

TAX ADMINISTRATION BUREAU-
STATE OF MISSOURI
P.O. BOX 700
DEPARTMENT OF REVENUE
JEFFERSON CITY, MO 65105-0700
(314) 751-2836

NATIONAL BANK FOR COOPERATIVES
5500 SOUTH QUEBEC STREET
GREENWOOD VILLAGE CO 80111

September 28, 1995

RE: MISSOURI CORPORATION INCOME TAX
YEAR BEGINNING: JANUARY 1, 1991,
JANUARY 1, 1992 AND JANUARY 1, 1993
FEDERAL ID NUMBER: 841102254
MITS NUMBER: 13495186

Dear Sir or Madam:

We have received your amended Missouri Corporation Income Tax Return for the tax year(s) beginning January 1, 1991, January 1, 1992 and January 1, 1993.

Your refund claim(s) are being denied for the following reasons:

One of the basis of your refund claims, Farm Credit Services of Central Arkansas, PCA, et al. v. State of Arkansas has been appealed and has not been finalized.

This denial of refund claim can be protested per Section 143.841, RSMo 1994. You must file a written protest setting forth the grounds on which the protest is based. If the written protest is not received within 60 days of the date of this letter, your amended return(s) will be retained for informational purposes only.

If you have any questions, please contact Gloria Howard, Tax Administration Bureau, P.O. Box 700, Jefferson City, Missouri 65105-0700.

Sincerely,

Diane S. Luebbering
Manager
Tax Administration Bureau

[Internal routing information omitted.]

EXHIBIT C

MISSOURI DEPARTMENT OF REVENUE

NATIONAL BANK FOR COOPERATIVES)
)
PROTEST OF DENIAL OF CLAIMS FOR REFUND)
CORPORATE INCOME TAX)
)
Final Decision)
YEAR: 1991, 1992, AND 1993)

FINDINGS OF FACT

National Bank for Cooperatives (hereinafter referred to as "Taxpayer") filed 1991, 1992 and 1993 Missouri Corporate Income tax returns. Taxpayer is a corporation that was formed by the consolidation of the National Bank for Cooperatives, the Farm Credit Bank of Springfield and the Springfield Bank for Cooperatives. On April 19, 1995, Taxpayer filed an application for tax refund/credit and amended corporation income tax returns requesting refunds of all taxes paid for the years 1991, 1992 and 1993 on the basis that Taxpayer was a Federal instrumentality and immune from income tax imposed by the State of Missouri.

Department records indicate that the corporation closed as of December 31, 1994. The Department of Revenue (hereinafter referred to as the "Department") issued a letter dated September 28, 1995 denying the income tax refund.

Taxpayer filed a timely protest. Taxpayer claimed that under the Supremacy Clause of the United States Constitution, no state may impose tax on a federal instrumentality unless Congress expressly consents to the tax. Taxpayer claims that The National Bank for Cooperatives is a federal instrumentality, and Congress has not consented to the imposition of state tax on these entities. Therefore, the National Bank for Cooperatives is exempt from state taxation, including the income tax of Missouri. On that basis, Taxpayer filed the claim for refund requesting a refund of all income tax paid with respect to tax years 1991, 1992 and 1993 and interest as provided by law.

BASIS OF DECISION

Title 12, of the United States Code, regulates banks and banking. Chapter 7 therein governs The Farm Credit Act, which established the Farm Credit Administration in 1933. It has since been repealed and in its place in Chapter 23, the Farm Credit System was established in 1971; to provide equitable and competitive interest rates to eligible agricultural borrowers. Congress recognized the need for agricultural credit in rural areas, and established the farmer-owned cooperative Farm Credit System.[1] Title 12 U.S.C. § 2002 established Farm Credit Banks which are privately owned. 12 U.S.C. § 2012 enables the Farm Credit Banks to establish a board of Directors; and 12 U.S.C. § 2013 grants the general corporate powers of the privately-owned farm credit banks.

Taxpayer is a privately chartered and owned Agricultural Credit Bank. The Taxpayer's Charter cites that "The Bank [Taxpayer] is an institution of the Farm Credit

---

[1]12 U.S.C. § 2001 (1986).

System." Further. the Charter cites "the Bank may offer credit and related services to eligible borrowers located within any territory that may be served by Farm Credit System institutions under the Act." The privately chartered and owned Agricultural Credit Bank is not an instrumentality of the United States that has any kind of tax exemption under 12 U.S.C. § 2077. Furthermore, no production credit associations have been owned by the federal government since 1968 that are tax-exempt from Missouri income tax.

The Charter does cite "The Bank is an institution of the Farm Credit System and a federally chartered instrumentality." However, the Taxpayer has no governmental regulatory authority and is a private entity. 12 U.S.C. § 2155 sets out the liability of the banks;

United States not liable.

> (1) Each bank of the System shall be fully liable on notes, bonds, debentures, or other obligations issued by it individually and shall be liable for the interest payments on long-term notes, bonds, debentures, or other

> obligations issued by other banks operating under the same subchapter of this chapter . . .
>
> (c) The United States shall not be liable or assume any liability directly or indirectly thereon.

A careful review of Chapter 23 of Title 12 of the Federal Code which regulates banks and banking confirms that the Taxpaver is not exempt from Missouri income tax. In the protest the Taxpayer relied on ***Farm Credit Services of Central Arkansas, PCA, et al. v. State of Arkansas***, 117 S.Ct. 1776 (1997), rev'g 76 F.3d 961 (CA-8, 1996). The Department finds it inapplicable.

Taxpayer has the burden of proof before the Director of Revenue on appeal. The Missouri statute that rules is as follows: Section 143.661, RSMo. Burden of proof on taxpayer, . . .

> In any proceeding before the director of revenue or on appeal under sections 143.011 to 143.996 the burden of proof shall be on the taxpayer . . .

The Taxpayer has not provided any documentation to support the assertions in the protest letter dated November 2. 1995, nor has Taxpayer responded to inquiries from the Department. Taxpayer has not sustained its burden to prove that the Taxpayer is immune from Missouri state income tax.

DECISION

It is the Final Decision of the Director of Revenue upon reconsideration that the denial of refund claim issued to Taxpayer is correct.

If you were adversely affected by this decision, you may appeal to the Administrative Hearing Commission. To appeal, you must file a petition with the Administrative Hearing Commission within thirty days after the date this decision was mailed or the date it was delivered, whichever date was earlier. If any such petition is sent by registered mail or certified mail, it will be deemed filed on the date it is mailed; if it is sent by any method other than registered mail

or certified mail, it will be deemed filed on the date it is received by the Commission.

Joyce Hainen Crandon
Legal Counsel

Dated: February 20, 1998

BEFORE THE
ADMINISTRATIVE HEARING COMMISSION
STATE OF MISSOURI

COBANK, ACB, AS SUCCESSOR TO THE NATIONAL BANK FOR COOPERATIVES,	)	
Petitioner,	)	
v.	)	Case No. 98-000716RI
DIRECTOR OF REVENUE, STATE OF MISSOURI,	)	
Respondent.	)	

ANSWER

COMES NOW Respondent, Director of Revenue, by and through counsel, and in answer to Petitioner's Complaint, the Respondent admits, denies and alleges as follows:

1. Respondent is without sufficient knowledge or information to form a belief as to the truth to admit or deny all of the allegations in all of the four (4) sentences of paragraph one (1) of Petitioner's petition.

2. Respondent admits the allegations of paragraph two (2).

3. Respondent admits the allegations of paragraph three (3).

4. Respondent is without knowledge or information to form a belief as to the truth to admit or deny allegations in sentence one (1) of paragraph four (4): Respondent denies allegations in sentence two (2) paragraph, four (4): Respondent denies allegations in sentence three (3), paragraph four (4).

5. Respondent admits the allegations in paragraph five (5).

6. Respondent admits to the allegations in paragraph six (6).

7. Respondent denies the allegation that CoBank timely protested Notice of Adjustment.

8. Respondent denies the allegation of denying CoBank's protest. Respondent admits that Exhibit C is a Final Decision issued to National Bank for Cooperatives.

9. Respondent denies all the allegations in all sentences of paragraph nine (9).

10. All allegations of the Petition not expressly admitted are denied.

WHEREFORE, having answered Petitioner's Complaint, Respondent prays that the Final Decision herein be sustained and for such further Orders as are just and proper.

Respectfully submitted,

Department of Revenue

Joyce Hainen Crandon
Legal Counsel
Missouri Department of
Revenue
Truman State Office Building
301 West High, Room 670

P.O. Box 475
Jefferson City, MO 65105-0475
Phone (573) 751-0961
Fax (573) 751-7151

Attorneys for Respondent

[Certificate of service omitted.]

BEFORE THE
ADMINISTRATIVE HEARING COMMISSION
STATE OF MISSOURI

COBANK, ACB, AS SUCCESSOR TO THE NATIONAL BANK FOR COOPERATIVES,	)	
Petitioner,	)	
v.	)	Case No. 98-000718RI
DIRECTOR OF REVENUE, STATE OF MISSOURI,	)	
Respondent.	)	

ANSWER

COMES NOW Respondent, Director of Revenue, by and through counsel, and in answer to Petitioner's Complaint, the Respondent admits, denies and alleges as follows:

1. Respondent is without sufficient knowledge or information to form a belief to admit or deny all of the allegations in all of the four (4) sentences of paragraph one (1) of Petitioner's petition.

2. Respondent admits the allegations of paragraph two (2).

3. Respondent admits the allegations of paragraph three (3).

4. Respondent is without knowledge or information to form a belief to admit or deny allegations in sentence one (1) of paragraph four (4): Respondent denies allegations in sentence two (2) paragraph, four (4): Respondent denies allegations in sentence three (3), paragraph four (4).

5. Respondent denies that CoBank filed an application and Amended income tax returns as alleged in paragraph five (5).

6. Respondent denies that it denied CoBank's refund claims for refund (sentence one (1)). Respondent admits that Exhibit B is the Department's notice issued to National Bank for Cooperatives.

7. Respondent denies the allegation that CoBank timely protested Notice of Adjustment.

8. Respondent denies the allegation of denying CoBank's protest. Respondent admits that Exhibit C is a Final Decision issued to National Bank for Cooperatives.

9. Respondent denies all the allegations in all sentences of paragraph nine (9).

10. All allegations of the Petition not expressly admitted are denied.

WHEREFORE, having answered Petitioner's Complaint, Respondent prays that the Final Decision herein be sustained and for such further Orders as are just and proper.

Respectfully submitted,

Joyce Hainen Crandon
Legal Counsel
Missouri Department of Revenue
Truman State Office Building
301 West High, Room 670

P.O. Box 475
Jefferson City, MO 65105-0475
Phone (573) 751-0961
Fax (573) 751-7151

Attorney for Respondent.

[Certificate of Service omitted.]

EXHIBIT 2 TO RESPONDENT SECRETARY OF STATE'S RESPONSE TO PETITIONER'S MOTION FOR SUMMARY DETERMINATION, PROPOSED FINDINGS OF FACT, PROPOSED CONCLUSION OF LAW AND BRIEF

BEFORE THE
ADMINISTRATIVE HEARING COMMISSION
STATE OF MISSOURI

COBANK, ACB, AS SUCCESSOR	)	
TO THE NATIONAL BANK FOR	)	
COOPERATIVES,	)	
Petitioner,	)	Case No.
v.	)	95-002048SS
SECRETARY OF STATE OFFICE	)	
STATE OF MISSOURI,	)	
Respondent.	)	

PETITIONER'S ANSWERS TO
SECRETARY'S FIRST INTERROGATORIES
TO COBANK

Comes Now Petitioner, and provides the following answers and objections to Respondent's first interrogatories:

INTERROGATORY 7:

Has National or Cobank ever paid franchise taxes, other excise taxes or privilege taxes based on income to states other than Missouri?

YES _X_. NO ___. If your answer is "yes,"

a) Identify each and every state to which such taxes were paid, the type of tax paid, and the year or years the same were paid between 1991 and the present:

ANSWER:

See attached Exhibit 1.

Exhibit 1

CoBank, ACB, As Successor to
National Bank for Cooperatives, Petitioner
v. Case No. 95-002048SS
Secretary of State Office
State of Missouri, Respondent

State:	Type:
Alabama	Bank Excise
Arizona	Corporate Franchise
Arkansas	Corporate Income/ Corporate Franchise
California	Corporate Income
Colorado	Corporate Income
Delaware	Corporate Income
Florida	Corporate Income
Georgia	Corporate Income
Idaho	Corporate Income
Illinois	Corporate Income
Indiana	Bank Franchise
Iowa	Bank Franchise

Taxes Paid

1991	1992	1993	1994	1995	1996
No	No	No	Yes	No	No
No	No	No	Yes	Yes	No
No	No	Yes	Yes	No	No
Yes	Yes	Yes	Yes	Yes	No
Yes	Yes	Yes	Yes	Yes	No
No	No	No	Yes	Yes	No
No	No	No	Yes	Yes	No
Yes	Yes	Yes	Yes	Yes	No
No	No	Yes	Yes	Yes	No
Yes	Yes	Yes	Yes	Yes	No
Yes	Yes	Yes	Yes	Yes	No

Kansas	Corporate Income	Yes	Yes	Yes	Yes	Yes	No
Kentucky	Intangible	Yes	Yes	Yes	Yes	Yes	No
Maine	Corporate Income	No	No	No	Yes	Yes	No
Maryland	Bank Franchise	Yes	Yes	Yes	Yes	Yes	No
Massachusetts	Bank Franchise	Yes	Yes	Yes	Yes	Yes	No
Minnesota	Corporate Income	Yes	Yes	Yes	Yes	Yes	No
Montana	Corporate Income	No	No	No	Yes	Yes	No
Nebraska	Corporate Income	Yes	Yes	Yes	Yes	Yes	No
New York	Bank Franchise	No	No	Yes	Yes	Yes	No
North Carolina	Corporate Income/Franchise	No	No	Yes	Yes	Yes	No
North Dakota	Corporate Income	No	No	Yes	Yes	Yes	No
Ohio	Corporate Franchise	No	No	No	Yes	Yes	No
Oklahoma	Corporate Income	Yes	Yes	Yes	Yes	Yes	No
Oregon	Corporate Franchise	Yes	Yes	Yes	Yes	Yes	No
South Carolina	Corporate Income	Yes	Yes	Yes	Yes	Yes	No
South Dakota	Bank Franchise	No	No	Yes	Yes	Yes	No
Tennessee	Bank Franchise	Yes	Yes	Yes	Yes	Yes	No
Vermont	Corporate Franchise	No	No	No	Yes	Yes	No

Virginia	Corporate Income
Wisconsin	Corporate Income

Refunds have been requested for all taxes paid for years for which the Statute of Limitations is still open. Refunds have been received from a number of states.

Yes	Yes	Yes	Yes	Yes	No
Yes	Yes	Yes	Yes	Yes	No

BEFORE THE
ADMINISTRATIVE HEARING COMMISSION
STATE OF MISSOURI

COBANK, ACB, AS SUCCESSOR TO THE NATIONAL BANK FOR COOPERATIVES,	)	
Petitioner,	)	Case No. 98-000716 RI
v.	)	Case No. 98-000718 RI
DIRECTOR OF REVENUE,	)	
Respondent.	)	
COBANK, ACB, AS SUCCESSOR TO THE NATIONAL BANK FOR COOPERATIVES,	)	
Petitioner,	)	Case No. 95-002048 SS
v.	)	
SECRETARY OF STATE OF THE STATE OF MISSOURI,	)	
Respondent.	)	

STIPULATION OF FACTS

It is hereby stipulated that, for purposes of this case, the following statements may be accepted as undisputed facts.

1. CoBank, ACB came into existence, and thus became the successor to The National Bank for Cooperatives, on January 1, 1995. A true and correct copy of CoBank, ACB's charter issued by the Farm Credit Administration is attached hereto.

DATED: 5-5-99 MISSOURI SECRETARY OF STATE

Respectfully submitted,

_____

Jill Jackson, Esq.
General Counsel's Office
Missouri Secretary of State
600 West Main Street
P.O. Box 778
Jefferson City, MO 65102

Attorney for the Missouri Secretary of State

DATED: 5-5-99 COBANK, ACB

Juan D. Keller, #19864
Bryan Cave LLP
211 North Broadway,
Suite 3600
One Metropolitan Square
St. Louis, MO 63102-
2750

Attorney for Petitioner

Of Counsel:

Richard A. Hanson, Esq.
Theodore R. Bots, Esq.
McDermott, Will & Emery
227 West Monroe Street
Chicago, IL 60606
Telephone: (312) 372-2000
Facsimile: (312) 984-7700

Attachment

FCA

Farm Credit Administration

CHARTER

CoBank, ACB
Arapahoe County, Colorado

The Farm Credit Administration, in accordance with sections 5.17(a) and 7.0 of the Farm Credit Act of 1971, as amended (the Act), hereby charters an Agricultural Credit Bank to be known as CoBank, ACB (the Bank), established pursuant to the consolidation of the National Bank for Cooperatives, the Springfield Bank for Cooperatives, and the Farm Credit Bank of Springfield. The principal office location of the Bank shall be in the City of Greenwood Village, County of Arapahoe, State of Colorado. The Bank is an institution of the Farm Credit System and a federally chartered instrumentality.

By this Federal charter, the Farm Credit Administration hereby authorizes the Bank to exercise all powers conferred on the Bank under the Act and the regulations of the Farm Credit Administration provided, however, that the territory served by the Bank pursuant to Title I of the Act shall be the States of Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont.

IN WITNESS WHEREOF, the Chairman of the Farm Credit Administration Board has executed this 13th day of December 1994. This charter shall be effective January 1, 1995.

CHARTER NO. 19 Farm Credit Administration
McLean, Virginia

_____
Marsha Martin
Chairman

Attest

_____
Floyd Fithion
Acting Secretary to the Board

SUPREME COURT OF THE UNITED STATES

Monday, June 26, 2000

Certiorari Granted
99-1792 Director of Revenue of Missouri v. Cobank ACB

The petition for a writ of certiorari is granted limited to the following question: "Does 12 U.S.C. Section 2134 authorize states to tax the income of the National Bank for Cooperatives, a federally chartered instrumentality of the United States?"

(10)

No. 99-1792

Supreme Court, U.S.
FILED
AUG 25 2000
CLERK

In the
SUPREME COURT OF THE UNITED STATES
October Term, 2000

DIRECTOR OF REVENUE OF MISSOURI,
Petitioner,

v.

CoBANK, ACB, as Successor to the
National Bank for Cooperatives,
Respondent.

On Writ of Certiorari
to the Supreme Court of Missouri

BRIEF FOR THE PETITIONER

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri

JAMES R. LAYTON*
State Solicitor
GAIL VASTERLING
DAVID LIEBER
Assistant Attorneys General
P.O. Box 899
Jefferson City, MO 65102
(573) 751-3321

*Counsel of Record

3688

QUESTION PRESENTED

May states tax the income of the National Bank of Cooperatives, a congressionally designated federal instrumentality, pursuant to 12 U.S.C. § 2134?

PARTIES TO THE PROCEEDING

All of the parties to this proceeding are listed in the caption.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

SUMMARY OF ARGUMENT 13

ARGUMENT 14

A. Congressionally-chartered entities designated as "federal instrumentalities" do not enjoy implied immunity from state taxes, unless they are so closely connected to the Government that the two cannot realistically be viewed as separate entities. 14

B. Because BFCs are not so closely connected to the Government that they cannot realistically be viewed as separate from the government and thus qualify for implied immunity from state taxes, the full extent of their tax immunity is defined by statute. 21

C. Congress has not granted BFCs immunity from state taxes, except those imposed on the BFCs' notes, debentures, and other obligations. 22

CONCLUSION 27

TABLE OF AUTHORITIES

Cases **Page**

Arizona Dept. of Revenue v. Blaze Constr. Co., 526 U.S. 32 (1999) 17

Arkansas v. Farm Credit Servs., 520 U.S. 821 (1997) 18-22

Austin v. Board of Aldermen, 74 U.S. (7 Wall.) 694 (1868) 22

Brown v. Gardner, 513 U.S. 115 (1994) 24

City of Detroit v. Murray Corp., 355 U.S. 489 (1958) . . . 16

Colorado Springs PCA v. Farm Credit Admin., 967 F.2d 648 (D.C. Cir. 1992) 7

Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) 27

Davis v. Michigan Dept. of Treasury, 489 U.S. 803 (1989) 23, 27

Director of Revenue v. Prod. Credit Ass'n of Southeastern Mo., 10 S.W.3d 142 (Mo. banc 2000) 1

Dobbins v. Commissioners of Erie County, 41 U.S. (16 Pet.) 435 (1842) 15

FTC v. Mandel Brothers, Inc., 359 U.S. 385 (1959) 23

Gillespie v. Oklahoma, 257 U.S. 501 (1922) 15

Graves v. New York ex rel. O'Keefe,
306 U.S. 466 (1939) 15, 21

Gustafson v. Alloyd Co., Inc., 513 U.S. 561 (1995) 23

James v. Dravo Contracting Co., 302 U.S. 134 (1937) ... 15

Jefferson County, Alabama v. Acker,
527 U.S. 423 (1999) 15

Mayo v. United States, 319 U.S. 441 (1943) 15, 20

M'Culloch v. Maryland, 17 U.S. (4 Wheat.)
316 (1819) 14-17, 19

Shaw v. Gibson-Zahniser Oil Co.,
276 U.S. 575 (1928) 20

United States v. New Mexico, 455 U.S. 720
(1982) 15-22, 24, 25

Constitutional and Statutory Authorities

7 U.S.C. § 941(c) (1988) 26

12 U.S.C. § 531 (1988) 26

12 U.S.C. § 1433 (1988) 26

12 U.S.C. § 1441a(g) (1988) 26

12 U.S.C. § 1452(d) (1988) 26

12 U.S.C. § 1723a(c) (1988) 26

12 U.S.C. § 1749bbb-20 (1988) 26

12 U.S.C. § 1768 (1988) 26

12 U.S.C. § 1795k(a) (1988) 26

12 U.S.C. § 1825 (1988) 26

12 U.S.C. § 2023 (1988) 5, 24, 26

12 U.S.C. § 2098 (1988) 26

12 U.S.C. § 2134 (1988) 2, 10, 12, 24, 25

12 U.S.C. § 2277a-12 (1988) 23

12 U.S.C. § 2278a-11 (1988) 24, 25

12 U.S.C. § 2278b-10 (1988) 24, 26

12 U.S.C. § 2290 (1988) 26

12 U.S.C. § 3019 (1988) 26

15 U.S.C. § 713a-5 (1988) 26

15 U.S.C. § 78kkk(e) (1988) 26

16 U.S.C. § 583j-2(e)(3) (West Supp. 2000) 26

16 U.S.C. § 8311 (1988) 26

16 U.S.C.A. § 191 (1988) 26

20 U.S.C. § 1087-2(b)(2) (1988) 26

22 U.S.C.A. 2124c(j) (West Supp. 2000) 26

28 U.S.C. § 1257 (1988) 2

42 U.S.C. § 8102(d) (1988) 26

49 U.S.C. § 24301(l) (1988) 26

U.S. Const. art. VI., cl. 2 2

Mo. Rev. Stat. § 143.071 (1994) 3, 4, 12

Mo. Rev. Stat. § 143.431 (1994) 4

Mo. Rev. Stat. § 143.441 (1994) 3

Agricultural Marketing Act Amendment,
Pub. L. No. 87-494, 76 Stat. 109 (1962) 7

Farm Credit Act of 1933, Pub. L. No. 73-98,
§ 40, 48 Stat. 257, 264 (1933) 5

Farm Credit Act of 1933, Pub. L. No. 73-98,
§ 63, 48 Stat. 257, 267 (1933) 6

Farm Credit Act of 1971, Pub. L. No. 92-181,
§ 3.12, 85 Stat. 583, 609 (1971) 10

Farm Credit Act of 1971, Pub. L. No. 92-181,
§ 5.18(10), 85 Stat. 583, 622 (1971) 8

Farm Credit Act of 1971, Pub. L. No. 92-181,
§§ 1.21, 2.8, 2.17, 3.13, 85 Stat.
583, 590, 597, 602, 608-09 (1971) 6, 8, 9, 23

Farm Credit Act of 1971, Pub. L. No. 92-181,
§§ 4.0 (a), 4.1 (b), 85 Stat. 583, 609-10 (1971) 7

Farm Credit Amendments Act of 1985,
Pub. L. No. 99-205, § 5.17(8),
99 Stat. 1678, 1692 (1985) 8

Farm Credit Amendments Act of 1985,
Pub. L. No. 99-205, § 205, 99
Stat. 1678, 1703-1707 (1985) 9

The Federal Farm Loan Act, Pub. L. No. 64-158,
§ 26, 39 Stat. 360, 380 (1916) 4, 23

The Federal Farm Loan Act, Pub. L. No. 64-158,
§ 4, 39 Stat. 360, 362 (1916) 4

The Federal Farm Loan Act, Pub. L. No. 67-503,
§ 210, 42 Stat. 1454, 1459 (1923) 5, 23

Other Authorities

131 Cong. Rec. H11506-03 (December 10, 1985) 11

131 Cong. Rec. H11546-02 (December 10, 1985) 11

131 Cong. Rec. H12529-01 (December 18, 1985) 12

131 Cong. Rec. S16698-01 (December 3, 1985) 8, 11

131 Cong. Rec. S17748-02 (December 17, 1985) 11

H.R. Rep. No. 425, 99th Cong., 1st Sess. 5 (1985),
reprinted in 1985 U.S.C.C.A.N.
2587, 2591 ..... 4, 5, 8, 10, 11

H.R. Rep. No. 593, 92nd Cong., 1st Sess. 9 (1971),
reprinted in 1971 U.S.C.C.A.N. 2091, 2099 .... 5, 7

H.R. 3792, 99th Cong., 1st §§ 512(7)(a)(8),
205(e)(10) (November 20, 1985) 8

S. Rep. No. 124, 73rd Cong., 1st Sess. 2 (1933) 5

S. 1884, 99th Cong., 1st Sess. §§106(c)(1),
110(8) (1985) 8

In the
SUPREME COURT OF THE UNITED STATES
October Term, 2000

No. 99-1792

DIRECTOR OF REVENUE OF MISSOURI,

Petitioner,

v.

CoBANK, ACB, as Successor to the National Bank for Cooperatives,

Respondent.

On Writ of Certiorari
to the Supreme Court of Missouri

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of Missouri (Petition Appendix (P.A.) A-1-A-4), entered on January 25, 2000, is reported at 10 S.W.3d 142. The opinion covers two appeals, one by three "production credit associations" (PCAs), and one by a "bank for cooperatives" (BFC), CoBank. The decision of Missouri's Administrative Hearing Commission (AHC) is not reported; it is printed at P.A. A-5-A-16.

JURISDICTION

The Supreme Court of Missouri entered its judgment on January 25, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U.S. Const. art. VI., cl. 2:

> This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

12 U.S.C. § 2134 (1988):

> Each bank for cooperatives and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such bank shall be exempt, both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territorial, or local taxing authority, except that interest on such obligations shall be subject to Federal income taxation in the hands of the holder.

Mo. Rev. Stat. § 143.071 (1994):

> 1. For all tax years beginning before September 1, 1993, a tax is hereby imposed upon the Missouri taxable income of corporations in an amount equal to five percent of Missouri taxable income.
>
> 2. For all tax years beginning on or after September 1, 1993, a tax is hereby imposed upon the Missouri taxable income of corporations in an amount equal to six and one-fourth percent of Missouri taxable income.

Mo. Rev. Stat. § 143.441 (1994) (in pertinent part):

> 1. The term "corporation" means every corporation, association, joint stock company and joint stock association organized, authorized or existing under the laws of this state and includes:
>
> (1) Every corporation, association, joint stock company, and joint stock association organized, authorized, or existing under the laws of this state, and every corporation, association, joint stock company, and joint stock association, licensed to do business in this state, or doing business in this state, and not organized, authorized, or existing under the laws of this state, or by any receiver in charge of the property of any such corporation, association, joint stock company or joint stock association;
>
> . . . .

2. The tax on corporations provided in subsection 1 of section 143.431 and section 143.071 shall not apply to:

. . .

(5) Any other corporation that is exempt from Missouri income taxation under the laws of Missouri or the laws of the United States.

STATEMENT OF THE CASE

This case addresses state taxation of Banks for Cooperatives – entities established by federal charter that make loans to agricultural cooperatives. *See* H.R. Rep. No. 425, 99th Cong., 1st Sess. 5 (1985), *reprinted in* 1985 U.S.C.C.A.N. 2587, 2591. Like Production Credit Associations and other similar entities, they are part of the Farm Credit System, the establishment of which began with the creation of Federal Land Banks in 1916. The Federal Farm Loan Act, Pub. L. No. 64-158, § 4, 39 Stat. 360, 362 (1916). The System is regulated by the Farm Credit Administration, an independent regulatory agency of the United States government. H.R. Rep. No. 425 at 5, 1985 U.S.C.C.A.N. at 2592.

From the beginning, Congress comprehensively specified the tax treatment of each type of Farm Credit System institution. Congress began by giving the original Federal Land Banks a broad exemption from taxation. That exemption applied to the banks themselves, to their assets, and to their income. Pub. L. No. 64-158, § 26, 39 Stat. at 380. As to real property taxes, however, Congress clearly distinguished the Land Banks from federal agencies generally: federal agency lands were not taxed; Land Bank-owned land was. *Id.*

Over the years, as the Farm Credit System grew in size

and scope, Congress continued the practice of specifying tax treatment. For example, when Congress created the Federal Intermediate Credit Banks in 1923, it gave them the same broad statutory tax exemption possessed by Land Banks since 1916. The Federal Farm Loan Act, Pub. L. No. 67-503, § 210, 42 Stat. 1454, 1459 (1923). When Congress streamlined the system in 1987 by merging the Land Banks and the Intermediate Credit Banks, it made only slight changes to 1916 wording. *See* 12 U.S.C. § 2023.

Banks for Cooperatives (BFCs) were authorized by the Farm Credit Act of 1933, Pub. L. No. 73-98, § 40, 48 Stat. 257, 264 (1933). BFCs make loans to agricultural, aquatic, and rural utility cooperatives and provide financial services to cooperatives engaged in international trade. H.R. Rep. No. 425 at 5, 1985 U.S.C.C.A.N. at 2592. When they were first created, the BFCs were capitalized and owned entirely by the federal government. Over the years, however, borrowers achieved what Congress had intended (S. Rep. No. 124, 73rd Cong., 1st Sess. 2 (1933)): the government's stock was retired, and ownership was vested entirely in private hands. "All government and seed money advanced was paid back to the United States Treasury as of 1968." H.R. Rep. No. 425 at 5, 1985 U.S.C.C.A.N. at 2591.[1]

When it created BFCs, Congress maintained its practice of specifying the scope of the BFCs' tax immunity. But the tax

---

[1]BFCs initially were capitalized by the United States out of the revolving fund from which the Federal Farm Board previously made loans to cooperatives under the Agricultural Marketing Act of 1929. Under the provisions of the Farm Credit Act of 1955, the government capital in the BFCs has been systematically retired by the creation of permanent capital provided by users of the BFCs. The first of the BFCs to retire all of its government capital did so in 1965 and the last in 1968. H.R. Rep. No. 593, 92nd Cong., 1st Sess. 9 (1971), *reprinted in* 1971 U.S.C.C.A.N. 2091, 2099.

exemption that Congress specified for BFCs differed from that granted to the Land Banks and the Intermediate Credit Banks. The exemption began with the declaration – still in the law today – that "Banks for Cooperatives . . . and their obligations [are] instrumentalities of the United States." Pub. L. No. 73-98, § 63, 48 Stat. at 267. What followed in that same sentence was a specific exemption for the financial instruments of the BFCs: "and as such, any and all notes, debentures, bonds, and other such obligations issued by [BFCs] shall be exempt both as to principal and interest from all taxation . . . imposed by the United States or by any State, Territorial, or local taxing authority." *Id.* Congress then gave BFCs another broader but temporary exemption: "[BFCs], their property, their franchises, capital, reserves, surplus, and other funds, and their income, shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority."[2] *Id.* The provision concluded with what we would now call a "sunset" clause: the broad exemption for any BFC expired once the government was no longer a stockholder in that BFC. *Id.* Thus the government temporarily lent its credit and resources to make each BFC viable, and made states and local governments share the burden by precluding them from imposing taxes on that BFC, other than property taxes, for as long as BFC stock was owned by the federal government.

Congress substantially rewrote the Farm Credit System statutes in the Farm Credit Act of 1971, but left unchanged the differing tax exemptions granted to the various system institutions. *See* Pub. L. No. 92-181, §§ 1.21, 2.8, 2.17, 3.13, 85 Stat. 583, 590, 597, 602, 608-09 (1971). Under the 1971 Act

---

[2]Notably, even that broad exemption contained an exception for property taxes: "except that any real property and any tangible personal property . . . shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed." *Id.*

there was still a possibility that the broad, contingent tax exemption might be invoked by a BFC: the 1971 Act provided that the revolving fund established in the Agricultural Marketing Act, as amended, Pub. L. No. 87-494, 76 Stat. 109, would be preserved and made available for the temporary investment in stock of BFCs by the Governor of the Farm Credit Administration. Farm Credit Act of 1971, Pub. L. No. 92-181, §§ 4.0 (a), 4.1 (b), 85 Stat. 583, 609-10 (1971); H.R. Rep. No. 593 at 23-24, 1971 U.S.C.C.A.N. at 2113-14.

Just as the savings and loan crisis prompted reform of the federal deposit insurance program, a crisis in American agriculture persuaded Congress to restructure the Farm Credit System in 1985. *See generally Colorado Springs PCA v. Farm Credit Admin.*, 967 F.2d 648, 650-52 (D.C. Cir. 1992). The restructuring was designed to accomplish the following:

I. Give the Farm Credit System broader authority to use its own resources to shore up weak system units.

II. Reshape the Farm Credit Administration, an independent federal agency, to make it a stronger, arm's-length regulator of the System.

III. Provide new protection for system borrowers.

IV. Provide that if the Farm Credit Administration certifies that the System needs financial aid and has made the maximum practicable effort to deal with financial stress, the Secretary of the Treasury would have discretionary

> power to backstop the System's finances by purchasing obligations of a System unit called the Farm Credit System Capital Corporation.

H.R. Rep. No. 425 at 1, 1985 U.S.C.C.A.N. at 2587-88.

That restructuring eliminated the position of "Governor" of the Farm Credit Administration. *Id.* at 28-29, 1985 U.S.C.C.A.N. at 2615. And it eliminated the power of the Farm Credit Administration to make investments in stock of BFCs out of the revolving fund. *Compare* Pub. L. No. 92-181, § 5.18(10), 85 Stat. at 622 (1971) *with* Farm Credit Amendments Act of 1985, Pub. L. No. 99-205, § 5.17(8), 99 Stat. 1678, 1692 (1985). This change was designed to eliminate the Farm Credit Administration's involvement in the management activities of the System institutions in order to make it a stronger, arm's-length regulator of the system. *See* H.R. Rep. No. 425 at 23-24, 1985 U.S.C.C.A.N. at 2609-10.

Because the title "Governor" and a reference to the Governor holding stock appeared in the last sentence of the BFC tax exemption statute (the "sunset" clause), the restructuring required revision of that law.[3] Within a section of the 1985 Amendments titled "Technical and Conforming Amendments," the statute struck references to "Governor" in

---

[3]In early versions of the bill, the Farm Credit Administration still had the power to make investments in the stock of BFCs. And instead of striking the last two sentences of § 3.13, only the word "Governor" was stricken from the last sentence or sunset clause. Thus, when the bill retained the possibility for the Farm Credit Administration to own stock in BFCs, the exemption and sunset clause remained in the bill. *See* H.R. 3792, 99th Cong., 1st Sess. §§ 5.12(7)(a)(8), 205(e)(10) (November 20, 1985); S. 1884, 99th Cong., 1st Sess. §§ 106(c)(1), 110(8), 131 Cong. Rec. S16698-01 (December 3, 1985).

twenty-seven sections of the law and references to the Governor holding stock in twenty-three sections of the law. Pub. L. No. 99-205, § 205, 99 Stat. at 1703-1707 (1985).[4] The stricken last two sentences of § 3.13 contained the broad exemption from taxes followed by the sunset clause:

> Such banks, their property, their franchises, capital, reserves, surplus, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, territorial, or local taxing authority; except that interest on the obligations of such banks shall be subject only to Federal income taxation in the hands of the holder thereof pursuant to the Public Debt Act of 1941 (31 U.S.C. 742(a)) and except that any real and tangible personal property of such banks shall be subject to Federal, State, territorial, and local taxation to the same extent as similar property is taxed. The exemption provided in the preceding sentence shall apply only for any year or part thereof in which stock in the bank for cooperatives is held by the Governor of the Farm Credit Administration.

---

[4]Included among these revisions with regard to BFCs are: striking out "except for stock held by the Governor" in § 3.3(e); striking out a sentence referring to nonvoting stock held by the Governor in § 3.5; striking out subsection (a) of § 3.11 dealing with the application of savings "at the end of each fiscal year when said bank shall have stock outstanding held by the Governor"; striking out the precursor in § 3.11 (b) of "Whenever at the end of any fiscal year a bank for cooperatives shall have no outstanding capital stock held by the Governor"; striking out the references in § 3.12 to "any stock held by the Governor of the Farm Credit Administration at par" and "stock held by the Governor of the Farm Credit Administration"; and, finally, "striking out the last two sentences of section 3.13." Pub. L. No. 99-205, § 2.05, 99 Stat. at 1705.

Pub. L. No. 92-181, § 3.12, 85 Stat. at 609 (1971).

What remained, with minor subsequent changes, was the tax exemption for BFCs codified at 12 U.S.C. § 2134. Congress, having deleted the broad exemption in the original statute for which no BFC remained eligible, preserved the tax-exempt status only of investment vehicles issued by BFCs:

> Each bank for cooperatives and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such associations shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territorial, or local taxing authority, except that interest on such obligations shall be subject to Federal income taxation in the hands of the holder.

12 U.S.C. § 2134 (1988).

The legislative history of the Farm Credit Amendments Act of 1985 never suggests a change in tax immunity in its forty-nine page report. The House Agricultural Committee makes no mention of the taxable status of BFCs, let alone an expansion of the scope of tax exemptions for BFCs. H.R. Rep. No. 425 at 1-49, 1985 U.S.C.C.A.N. at 2587-2636.[5] No Senate

[5]The congressional committee described the purpose of the "technical and conforming" amendments, which included striking the last two sentences of § 3.13, as follows:

> Section 205 contains numerous technical and conforming amendments to the provisions of the Farm Credit Act of 1971 affected by changes in the basic powers, duties and authorities of the Farm Credit Administration. This section would amend the appropriate provisions of the Act to delete the requirement for specific approval by the Farm Credit Administration of certain activities of the banks and associations and by deleting the general authority of the Farm Credit Administration to supervise system institutions. These changes are consistent with one of the major purposes of the legislation which is to establish the Farm Credit Administration as an arms length regulator of the system institutions and to take it out of certain activities of the system which would involve it in management discretion of such institutions.
>
> This section also contains amendments which conform specific sections of the Act to the change made by the merger of the revolving funds and the elimination of the authority to make separate investments in individual institutions. As amended by the Act, the Farm Credit Administration may only make investments from the section 4.0 revolving fund in the Farm Credit System Capital Corporation. This section also contains conforming amendments to other sections of the Act which delete the individual authorities of the system institutions to exercise authorities delegated to them by the Farm Credit Administration.
>
> Finally, this section deletes references to the Governor of the Farm Credit Administration and the Federal Farm Credit Board, since such office and board will no longer exist, and substitutes for such provisions, a reference to the "Farm Credit Administration."

H.R. Rep. No. 425 at 28-29, 1985 U.S.C.C.A.N. at 2615.

report was submitted with the legislation. No one made mention of the tax status of BFCs or an expansion of the scope of tax exemptions for BFCs in either the House or Senate proceedings and debates on the Act. *See* 131 Cong. Rec. S16698-01 (December 3, 1985), 131 Cong. Rec. H11506-03 (December 10, 1985), 131 Cong. Rec. H11546-02 (December 10, 1985), 131 Cong. Rec. S17748-02 (December 17, 1985),

131 Cong. Rec. H12529-01 (December 18, 1985).

Following the 1985 Amendments, the National Bank for Cooperatives (NBC) filed Missouri corporate income tax returns and paid income tax for tax years through 1994. Joint Appendix (J.A.) A-13-A-15, A-29.

In 1995, CoBank, as successor to NBC,[6] filed amended returns on behalf of NBC, seeking refunds of income tax paid for 1991 through 1994. J.A. A-8, A-25. CoBank did not argue that it was excluded from taxation by Missouri law. It relied, instead, on federal immunity. The Missouri Director of Revenue denied those claims in pertinent part, imposing Missouri's corporate income tax on CoBank pursuant to Mo. Rev. Stat. § 143.071 (1994). J.A. A-16-A-22, A-31-A-37.

CoBank filed a complaint in Missouri's Administrative Hearing Commission (AHC), challenging that decision. J.A. A-6-A-37. The AHC upheld the Director's denial. P.A. A-16. For jurisdictional reasons, it did not reach CoBank's immunity claim. *Id.*

CoBank then appealed to the Missouri Supreme Court, which decided CoBank's immunity claim. It held that BFCs are federal instrumentalities, that federal instrumentalities cannot be taxed absent a clear and express statutory waiver of immunity, that the language 12 U.S.C. § 2134 does not contain express consent to state taxation, and thus that the State of Missouri could not impose state income taxes on BFCs. P.A. A-2-A-3.

---

[6] The National Bank for Cooperatives, which operated in Missouri, was formed by the mergers of many of the existing BFCs in 1989. CoBank was formed in 1995 from a consolidation of NBC with two other entities. In 1999, the sole remaining independent BFC also merged into CoBank.

Petitioner filed a Petition for Writ of Certiorari in this Court seeking to correct the decision of the Missouri Supreme Court. On June 26, 2000, this Court granted the petition. J.A. A-59.

SUMMARY OF ARGUMENT

The Missouri Supreme Court's decision was based on the doctrine of implied immunity from state taxation for federal instrumentalities. In its first century, that doctrine was applied broadly, and the Missouri Supreme Court's demand for an express waiver of immunity would have made sense. But in its second century, the application of implied tax immunity has been significantly circumscribed. Today, only those entities that are so closely associated with the government that the two are indistinguishable can claim implied immunity from all state taxes.

Of course, Congress may also provide that other federal instrumentalities it authorizes or creates shall be immune from some or all state or local taxes. But for those entities, the immunity is defined by statute, not by reference to implied immunity.

Although BFCs are, by express congressional designation, "federal instrumentalities," this label does not establish a congressional intent to entitle them to the complete freedom from state taxation the Government itself enjoys, particularly where that label is applied in the context of a far narrower grant of immunity. BFCs are easily distinguishable from the Government itself, and they do not qualify for implied, absolute tax immunity merely because they have explicitly been given certain specified rights and privileges as "federal instrumentalities." The Missouri Supreme Court thus erred by insisting on an express congressional waiver of immunity, and

by belittling the significance of Congress's limited grant of immunity.

BFCs must look to Congress and statutes for immunity from state taxation. But the grant of tax immunity to BFCs is limited to immunity from the taxation of BFCs' notes, debentures, and other obligations. Thus Missouri can impose income and other taxes unless and until Congress adds them to the list of proscriptions.

ARGUMENT

A. Congressionally-chartered entities designated as "federal instrumentalities" do not enjoy implied immunity from state taxes, unless they are so closely connected to the Government that the two cannot realistically be viewed as separate entities.

The doctrine of implied tax immunity that forms the foundation for the Missouri Supreme Court's decision originated in *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). There, this Court ruled not only that the Second Bank of the United States – a federally chartered bank partially owned by the United States – was constitutionally established, but also that the Supremacy Clause prevented the states from attempting to tax it out of existence through the imposition of discriminatory taxes upon the Bank's notes and other instrumentalities: "[T]he states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government." *Id.* at 436.

In the first century after *M'Culloch*, the doctrine of implied intergovernmental tax immunity was rapidly expanded

to prohibit even those nondiscriminatory state taxes that only marginally and incidentally impacted federal activities, such as taxes on the income of federal employees, *Dobbins v. Commissioners of Erie County*, 41 U.S. (16 Pet.) 435 (1842), and on income generated by property leased from the federal government, *Gillespie v. Oklahoma*, 257 U.S. 501 (1922). Beginning in the 1930's, however, as the scope of federal governmental activities expanded, this Court progressively narrowed the scope of this implied immunity, allowing, for instance, state taxation of income received from services provided to the federal government, *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937), and of the income of federal employees, *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939). *See Jefferson County, Alabama v. Acker*, 527 U.S. 423, 436-37 (1999) ("Until 1938, the intergovernmental tax immunity doctrine was expansively applied . . . . Since *Graves*, we have reaffirmed 'a narrow approach to governmental tax immunity . . . .'") (quoting *United States v. New Mexico*, 455 U.S. 720, 735 (1982)).

This narrowing trend culminated in *United States v. New Mexico*, 455 U.S. 720 (1982) (*New Mexico*), in which this Court comprehensively reexamined the constitutional bases and proper scope of the implied intergovernmental tax immunity doctrine. Recognizing the "confusing nature of [its] precedents" and the inconsistent results that the implied immunity doctrine had produced, this Court unanimously announced a return to the "underlying constitutional principle," *i.e.*, that "a State may not, consistent with the Supremacy Clause, lay a tax 'directly upon the United States.'" *Id.* at 733 (quoting *Mayo v. United States*, 319 U.S. 441, 447 (1943)). Although the Court noted that *M'Culloch* "could, and perhaps should" be read to prohibit only taxes discriminating against the federal government or its instrumentalities, the Court reaffirmed that the implied immunity doctrine that had arisen in

M'Culloch's wake reflected "a deep instinct" that the federal system also required some form of absolute governmental tax immunity, even from non-discriminatory taxes. 455 U.S. at 733-34. Under the modern federal structure, however, this immunity doctrine has taken on "essentially symbolic importance," such that its scope is sharply limited. *Id.* at 735.

After *New Mexico*, any court considering whether a federal instrumentality can rely on implied intergovernmental tax immunity must first decide not just whether the entity in question is "an agency or instrumentality" of the Government, but whether it is "so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least so far the activity being taxed is concerned." *Id.* at 735. "[T]o resist the State's taxing power, a private taxpayer must actually 'stand in the government's shoes.'" *Id.* at 736 (quoting *City of Detroit v. Murray Corp.*, 355 U.S. 489, 503 (1958) (opinion of Frankfurter, J.)). Thus, status as an agent of the government does not entitle a taxpayer to immunity; instead, the taxpayer must be "so intimately connected with the exercise of a power or the performance of duty by the government that [taxation] would be a direct interference with the functions of government itself." *Id.* at 455 U.S. 736. The only entities automatically entitled to immunity are those that are "virtually an arm of the Government," or have been "incorporated into the Government structure." *Id.* at 736-37.

This rule, narrowly circumscribing the intergovernmental tax immunity doctrine, vindicates the Supremacy Clause while recognizing the important countervailing interest in respecting state sovereignty. Because "the principal purpose of the immunity doctrine" is to "forestall[] clashing sovereignty," a rule limiting the implied immunity doctrine to cases where the states attempt to "lay[] demands directly on the Federal Government" is "a narrow

approach," which "accords with competing constitutional imperatives, by giving full range to each sovereign's taxing authority." *Id.* at 735-36. This narrow approach also has the benefit of placing the primary responsibility for determining which aspects of state taxation might burden federal operations where that responsibility belongs – on Congress:

> If the immunity of federal contractors is to be expanded beyond its narrow constitutional limits, it is Congress that must take responsibility for the decision . . . . And this allocation of responsibility is wholly appropriate, for the political process is uniquely adapted to accommodating the competing demands in this area. But absent congressional action, we have emphasized that the States' power to tax can be denied only under the clearest congressional mandate.

Id. at 737-38 (internal citations and quotation marks omitted).

The highly political nature of the process of accommodating the financial needs of competing sovereignties also requires that Congress, and not the executive or the judiciary, be the branch of the federal government primarily responsible for determining the bounds of intergovernmental tax immunity. *See id.* at 737 (condemning approach that allows "an immunity of constitutional stature" to be founded on the manner in which a "government functionary" draws up a particular contract); *Arizona Dept. of Revenue v. Blaze Constr. Co.*, 526 U.S. 32, 38 (1999) ("Whether to exempt [a federal contractor] from Arizona's transaction privilege tax is not our decision to make; that decision rests, instead with the State of Arizona and with Congress."). *M'Culloch* and *New Mexico*, combined, still permit Congress to determine the bounds of tax

immunity implicitly, *i.e.*, by giving an entity the attributes that permit it to partake of implied immunity under *New Mexico*. But this Court's recent decisions suggest that the judiciary should be reluctant to extend implicit immunity to non-governmental entities unless Congress has clearly endorsed that extension.

The fact that Congress has labeled an entity a "federal instrumentality" does not constitute such an endorsement – particularly where, as here, it is accompanied by a provision defining the instrumentality's tax immunity. Nor can the mere label, in terms of the *New Mexico* standard, conclusively establish that the labeled entity is such an integral part of the Government as to entitle it to the complete implied immunity from taxation that the Government itself enjoys. Thus in *Arkansas v. Farm Credit Servs.*, 520 U.S. 821 (1997) (*Farm Credit*), this Court rejected the idea that such a label vests an entity with the full range of governmental immunities.

Rather than converting an entity into an alter ego of the Federal Government, this Court held, use of the label "federal instrumentality" still left to Congress responsibility for defining an entity's ability to access government benefits and immunities: "An instrumentality of the United States can enjoy the benefits and immunities conferred by explicit statutes . . . without the further inference that the instrumentality has all of the rights and privileges of the National Government." *Id.* at 829.[7] As *Farm Credit* suggests, Congress may use the "federal

---

[7]In that respect, the *Farm Credit* decision upholds the same important federalism principles that animated the narrow approach to intergovernmental tax immunity established in *New Mexico*:

> In our constitutional system, the power of the State to tax is a concurrent power. "That the power of taxation is one of vital importance; that it is retained by the States; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments: are truths which have never been denied." *McCulloch v. Maryland*, 4 Wheat. 316, 425, 4 L.Ed. 579 (1819). The power to tax is basic to the power of the State to exist.

Id. at 826.

instrumentality" label to specify that an entity stands in the shoes of the Government for certain, explicitly defined purposes, without implying that such an entity becomes the Government for all purposes. Where the explicit statutory immunity accompanying the "federal instrumentality" label is a narrow one, Congressional endorsement of a sweeping implied immunity is plainly lacking, and the mere fact that Congress has used the words "federal instrumentality" does not, in and of itself, compel a different result.

Here, then, was the fundamental error committed by the Missouri Supreme Court: it ignored that teaching from *Farm Credit* and thus avoided having to decide whether Congress intended that BFCs should qualify for implied immunity under the *New Mexico* standard. For that court and for CoBank, that BFCs are congressionally-designated "federal instrumentalities" was enough to ensure them the benefits of implied immunity. Thus the Missouri Supreme Court held that the instrumentality designation implicitly creates the universal state tax immunity that the federal government itself enjoys, and then that any contrary implication may only be dispelled through clear and express language. P.A. A-2-A-3.

Contrary to this inflexible holding, this Court has never concluded that federal instrumentalities, whether labeled by Congress as such or not, should be deemed presumptively immune from state taxation on the strength of that

characterization alone. Rather, even when it has concluded that a particular entity is in fact a federal instrumentality, this Court has nevertheless undertaken to determine the federal purpose of the instrumentality, and has emphasized that the courts must look to how Congress defined the authority and character of the instrumentality to determine the scope of the instrumentality's immunity: "What governmental instrumental-ities will be held free from state taxation, though Congress has not expressly so provided, cannot be determined apart from the purpose and character of the legislation creating them." *Shaw v. Gibson-Zahniser Oil Co.*, 276 U.S. 575, 578 (1928). Thus, "[t]here are some instrumentalities which, though Congress may protect them from state taxation, will nevertheless be subject to that taxation *unless* Congress speaks." *Id.* at 581 (emphasis added).

Because this Court has never adopted a rule requiring express waivers of tax immunity for all federal instrumentalities, it has never suggested what the Missouri Supreme Court held: that congressional silence regarding a state tax means that tax cannot be imposed. Rather, "[t]he silence of Congress as to the subjection of its instrumentalities, other than the United States, to local taxation or regulation is to be interpreted in the setting of the applicable legislation and the particular exaction." *Mayo v. United States*, 319 U.S. 441, 448 (1943). And consideration of the "setting of the applicable legislation and the particular exaction" requires inquiry into the same factors that guide the question of whether that instrumentality is inherently constitutionally exempt: "[W]hen exemption from state taxation is claimed on the ground that the federal government is burdened by the tax, and Congress has disclosed no intention with respect to the claimed immunity, it is in order to consider the nature and effect of the alleged burden, and if it appears that there is no ground for implying constitutional immunity, there is equally a want of any ground

for assuming any purpose on the part of Congress to create an immunity." *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 480 (1939).

Under *New Mexico* and *Farm Credit*, then, BFCs partake of implied immunity only if they show that their functions are "so intimately connected with the exercise of a power or the performance of duty by the Government that taxation of it would be a direct interference with the functions of government itself." *New Mexico*, 455 U.S. at 736. As discussed in part B, *infra*, CoBank cannot make that showing. Thus CoBank must show that Congress granted BFCs immunity from state income taxes. As discussed in part C, *infra*, CoBank cannot make that showing either.

B. Because BFCs are not so closely connected to the Government that they cannot realistically be viewed as separate from the government and thus qualify for implied immunity from state taxes, the full extent of their tax immunity is defined by statute.

Particularly with respect to the activity being taxed here – the generation of income from making loans in competition with commercial banks – BFCs such as the National Bank for Cooperatives and its successor, CoBank, are not functionally indistinguishable from the federal government. Rather, they are wholly owned and operated by private entities and, most importantly for purposes of an income tax, their income is produced for the benefit of their (private) shareholders, and not for the benefit of the government or the public.

BFCs are, in this respect, indistinguishable from the production credit associations (PCAs) whose tax immunity was at issue in *Farm Credit*. The interests of BFCs, like the interests of PCAs, "are not coterminous with those of the

Government any more than most commercial interests." *Farm Credit*, 520 U.S. at 831. BFCs, like PCAs, "more closely resemble . . . private entities" than the federal government and its agencies, exercising no regulatory authority "but rather serv[ing] specific commercial and economic purposes long associated with various corporations chartered by the United States." *Id.* at 830-31.

As this Court concluded as to PCAs in *Farm Credit*, the interests of BFCs are not sufficiently identical to those of the government that they "cannot realistically be viewed as separate entities." Thus BFCs cannot qualify for implied immunity under the *New Mexico* standard.

C. Congress has not granted BFCs immunity from state taxes, except those imposed on the BFCs' notes, debentures, and other obligations.

CoBank can only claim immunity from state taxation, then, to the extent that such immunity has been granted by Congress. The extent of the grant of immunity to BFCs is unambiguous, and has been since the BFCs were first authorized nearly 70 years ago.

The original statute gave BFCs immunity for their notes, debentures, and obligations, denied immunity from property tax, and granted immunity temporarily from other state and local taxes. *See* p. 6, *supra*. Since 1985, BFCs have had immunity only as to their notes, debentures, and obligations. *See* pp. 9-10, *supra*. The statutory language leaves no "well-grounded doubt" to be "resolved in favor of the exemption." *Austin v. Board of Aldermen*, 74 U.S. (7 Wall.) 694, 699 (1868).

Nor can doubt be found in the statute's history. As

noted above, before 1985 Congress comprehensively defined the scope of BFC immunity: BFCs were immune from all state and local taxes (except property taxes) while the government was a stockholder; and they lost all their immunity, except for taxes on "notes, debentures, and other obligations," when the government's stock was retired. The 1985 amendments eliminated the "sunset" clause, which no longer had any effect because the government's stock had been retired since 1968 and the Farm Credit Administration no longer possessed the power to invest in the stock of BFCs. In eliminating the clause on which the sun had set, Congress did not eliminate its authorization of the states' power to tax BFCs. Nor was it entirely silent, as the Missouri Supreme Court presumes. Congress spoke through a combination of words (only "notes, debentures, and other obligations" are tax-exempt) and action (repeal of the broader, contingent, pre-1985 exemption).

Congress also spoke through its placement of section 2134 and the 1985 changes in a broader statutory scheme. *See Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989) (the words of a statute must also be read in their context and with a view toward their place in the overall statutory scheme); *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 569 (1995) (a court must interpret the statute "as a symmetrical and coherent regulatory scheme"); *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 389 (1959) (court must "fit, if possible, all parts into an harmonious whole."). Since 1916, Congress has comprehensively specified the tax treatment of each type of Farm Credit System institution. When Congress wished to grant an institution an unconditional exemption from all state and local taxes, except property taxes, it simply said so. *See* Pub. L. No. 64-158, § 26, 39 Stat. 360, 380 (1916) (Federal Land Banks), Pub. L. No. 67-503, § 210, 42 Stat. 1454, 1459 (1923) (Federal Intermediate Credit Banks), Pub. L. No. 92-181, § 1.21, 85 Stat. 583, 590 (1971) (Federal Land Bank

Associations). And since the 1985 Act, Congress has managed to say so again and again as it granted such exemptions to new entities. *See* 12 U.S.C. § 2023 (Farm Credit Banks), 12 U.S.C. § 2277a-12 (Farm Credit System Insurance Corporation), 12 U.S.C. § 2278a-11 (Assistance Board), 12 U.S.C. § 2278b-10 (Financial Assistance Corporation). If Congress had wished to grant BFCs an unconditional exemption in 1985, it undoubtedly knew how to do it. *See Brown v. Gardner*, 513 U.S. 115, 120 (1994) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." (internal citation omitted)). Indeed, in order to accomplish that result, Congress need only have deleted the sunset clause and left the broad exemption in the statute. Instead it struck both.

Congress did not speak to the contrary anywhere in the history of the 1985 Act. Rather than suggest that Congress intended to grant BFCs unique tax immunity, that record is completely silent on any change in the tax treatment of BFCs. The committee report and debates never mention the taxable status of BFCs, let alone an expansion of the scope of tax exemptions. The change to § 2134 is instead merely labeled a "technical and conforming" amendment. This characterization only makes sense if Congress merely intended to delete an exemption for which BFCs were no longer eligible. "Technical and conforming" could not describe an intent to radically change the tax status of BFCs and give them an unconditional exemption in lieu of a moribund exemption tied to government ownership of their stock. The "silence" thus speaks volumes – in opposition to CoBank's claim of a dramatic change.

The history of the Farm Credit Amendments further reveals an intent to render BFCs independent, private entities – the kind that obviously could not meet the *New Mexico*

standard. The purpose of the restructuring of the Farm Credit System in 1985 was to cut the ties between the Farm Credit Administration and the system banks and associations in order to make the Farm Credit Administration an arms-length regulator of the system. One such tie was the power of the Farm Credit Administration to invest in the stock of BFCs, a power eliminated in the 1985 Act. Thus, the history and purpose of the 1985 Act do not support a result in which BFCs are treated for tax purposes as if they stood in the shoes of the federal government. To the contrary, they support a conclusion that even if the BFCs qualified under the *New Mexico* standard before 1985 (which they did not), their government affiliation has since been significantly loosened.

There is nothing in the language of the current statute, in its evolution in the legislative history of the 1985 Act, nor even in logic to support the proposition that Congress returned to BFCs in 1985 the tax-exempt status they had enjoyed while owned in part by the United States. To the contrary, the extension of this position shows the perverted logic of the rule: it would give BFCs not just the tax benefits lost by BFCs many years ago, but benefits they had never enjoyed.

In that respect, the dramatic effect of the Missouri Supreme Court's ruling is best illustrated in the context of property taxes. Because Congress did not mention property taxes in its 1985 version of § 2134, the Missouri court's holding necessarily contemplates that property taxes would be among the taxes the BFCs need not pay. But Congress has clearly and consistently required federal instrumentalities in the Farm Credit System to pay property taxes – thus preserving an important source of revenue for rural governments and schools. *See* 12 U.S.C. § 2278a-11 (the Assistance Board must pay "taxes on real estate held by the Assistance Board to the same extent, according to its value, as other similar property held by

other persons is taxed"); 12 U.S.C. § 2278b-10 (same language for the Financial Assistance Corporation); 12 U.S.C. § 2023 (same language for the Farm Credit Banks); 12 U.S.C. § 2098 (same language for Federal Land Bank Associations).[8] BFCs were similarly required to pay property taxes before 1985 – even while wholly or partially owned by the United States, pursuant to language parallel to that applied to other Farm Credit System entities and later by virtue of having lost the protection of the broad tax exemption.

Now, as a result of the Missouri Supreme Court's ruling, BFCs (and PCAs, which have a parallel waiver statute) have become unique among federally-chartered, privately-owned financial institutions – the sole institutions not subject

[8] Congress has used similar language in defining the scope of immunity retained by federally-chartered financial institutions outside the Farm Credit System. *E.g.*, 12 U.S.C. § 531 (federal reserve banks); 12 U.S.C. § 1433 (federal home loan banks); 12 U.S.C. § 1441a(g) (Resolution Trust Corp.); 12 U.S.C. § 1452(d) (Federal Home Loan Mortgage Corp.); 12 U.S.C. § 1723a(c) (Government Nat'l Mortgage Ass'n and Federal National Mortgage Ass'n); 12 U.S.C. § 1749bbb-20 (National Insurance Development Fund); 12 U.S.C. § 1768 (federal credit unions); 12 U.S.C. § 1795k(a) (Central Liquidity Facility); 12 U.S.C. § 1825 (Federal Deposit Ins. Corp.); 12 U.S.C. § 2290 (Federal Financing Bank); 12 U.S.C. § 3019 (Nat'l Consumer Cooperative Bank); 15 U.S.C. § 713a-5 (Commodity Credit Corporation); 15 U.S.C. § 78kkk(e) (Securities Investor Protection Corp.); 20 U.S.C. § 1087-2(b)(2) (Student Loan Marketing Ass'n); 42 U.S.C. § 8102(d) (Neighborhood Reinvestment Corp.). By contrast, in other instances Congress has expressly exempted federal instrumentalities from property taxes. *See, e.g.*, 16 U.S.C.A. § 191 (National Park Foundation); 16 U.S.C. § 583j-2(e)(3) (West Supp. 2000) (National Forest Foundation); 22 U.S.C.A. 2124c(j) (West Supp. 2000) (Rural Tourism Development Foundation). *See also* 49 U.S.C. § 24301(l) (partial and conditional exemption for Amtrak). Congress' concern for preserving the ability of states to obtain revenue is so great that in some instances where the federal instrumentality is made exempt from property tax, Congress has authorized payments in lieu of taxes. *E.g.*, 7 U.S.C. § 941(c) (Rural Telephone Bank); 16 U.S.C. § 831l (Tenn. Valley Auth.).

to *any* state or local tax. That result is "implausible." *Davis*, 489 U.S. at 809 (confirming waiver though "Congress could perhaps have used more precise language," where argument against waiver was, in context, "implausible"). This Court should thus be "unconvinced that the contrast between the [pre-1985] express [but contingent] waiver of immunity and the [1985 amendment's partial] silence on the subject suggests that Congress intended to repeal the waiver in the [prior] act and thus to diametrically change course by implicitly barring state taxation." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 182 (1989).

CONCLUSION

Petitioner respectfully requests this Court to reverse the judgment of the Missouri Supreme Court and to render judgment for Petitioner.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

JAMES R. LAYTON*
State Solicitor
GAIL VASTERLING
DAVID LIEBER
Assistant Attorneys General
P.O. Box 899
Jefferson City, MO 65102
(573) 751-3321

Counsel for Petitioner

**Counsel of Record*
August 2000

Supreme Court, U.S.
FILED
OCT - 6 2000
CLERK

No. 99-1792

In The

Supreme Court of the United States

DIRECTOR OF REVENUE OF MISSOURI,

Petitioner,

v.

CoBANK, ACB, AS SUCCESSOR TO THE NATIONAL BANK FOR COOPERATIVES,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Missouri

BRIEF FOR THE RESPONDENT

RICHARD A. HANSON
Counsel of Record
THEODORE R. BOTS
McDERMOTT, WILL & EMERY
227 West Monroe Street
Chicago, IL 60606-5096
(312) 984-7799

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

47pp

QUESTION PRESENTED

The Court's Order granting the petition for certiorari states:

> The petition for a writ of certiorari is granted limited to the following question: "Does 12 U.S.C. Section 2134, authorize states to tax the income of the National Bank for Cooperatives, a federally chartered instrumentality of the United States?"

DISCLOSURE UNDER SUPREME COURT RULE 29.6

Neither CoBank, ACB, nor the National Bank for Cooperatives has a parent corporation, and no publicly held company owns ten percent or more of the stock of either entity.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

DISCLOSURE UNDER SUPREME COURT RULE 29.6 ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

The National Bank for Cooperatives and its Role in the Farm Credit System 3

The Proceedings Below 13

INTRODUCTORY STATEMENT REGARDING QUESTION PRESENTED 14

SUMMARY OF THE ARGUMENT 14

ARGUMENT 20

I. Fiscal Institutions Chartered by Congress Are Federal Instrumentalities and Immune from State Taxation Absent Congressional Authorization 21

II. The National Bank for Cooperatives Is a Fiscal Institution Chartered by Congress, and Is by Express Designation and its Governmental Function a Federal Instrumentality Immune from State Taxation Absent Congressional Authorization 24

TABLE OF CONTENTS – Continued

Page

III. The Decision in *United States v. New Mexico* Does Not Permit States to Tax the National Bank for Cooperatives Without Congressional Authorization 29

IV. 12 U.S.C. Section 2134 Is Unambiguous and Does Not Authorize States to Tax the National Bank for Cooperatives 31

CONCLUSION 38

TABLE OF AUTHORITIES

Page

CASES:

Arizona Department of Revenue v. Blaze Construction Co., 526 U.S. 32 (1999) 17, 30

Arkansas v. Farm Credit Services of Central Arkansas, 520 U.S. 821 (1997) 13, 27

Burlington Northern R.R. Co. v. Oklahoma Tax Commission, 481 U.S. 454 (1987) 17, 32

Cannon v. University of Chicago, 441 U.S. 677 (1979) 16, 27

Federal Land Bank v. Bismarck Lumber Co., 314 U.S. 95 (1941) 15, 17, 19, 25, 31, 35

Federal Land Bank v. Kiowa County, 368 U.S. 146 (1961) ..... *passim*

Federal Land Bank v. Priddy, 295 U.S. 229 (1935) 15

Federal Land Bank of Wichita v. Board of County Commissioners, 788 F.2d 1440 (10th Cir. 1986) 24

First Agricultural National Bank of Berkshire County v. State Tax Commission, 392 U.S. 339 (1968) 22, 23, 24

Graves v. New York ex rel. O'Keefe, 306 U.S. 466 (1939) 15, 22

James v. Dravo Contracting Co., 302 U.S. 134 (1937) 15, 21, 22

Marquette National Bank v. First of Omaha Corp., 439 U.S. 299 (1978) 23

Mayo v. United States, 319 U.S. 441 (1943) 32, 33

Memphis Bank & Trust Co. v. Garner, 459 U.S. 392 (1983) 15, 17, 25, 31

TABLE OF AUTHORITIES – Continued

Page

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) ..... *passim*

Osborn v. Bank of United States, 22 U.S. 738 (1824)...21, 22

Production Credit Association of Southeastern Missouri v. Director of Revenue, and *CoBank, ACB, as Successor to the National Bank for Cooperatives v. Director of Revenue*, 10 S.W.3d 142 (Mo. 2000) 13

Shaw v. Gibson-Zahniser Oil Corp., 276 U.S. 575 (1928) 33

United States v. Boyd, 378 U.S. 39 (1964)..... 30

United States v. Michigan, 851 F.2d 803 (6th Cir. 1988)..... 24

United States v. New Mexico, 455 U.S. 720 (1981) 16, 17, 21, 29, 30, 31

United States v. State Tax Commission, 481 F.2d 963 (1st Cir. 1973) 24

STATUTES:

7 U.S.C. Section 941 .....27, 28

12 U.S.C. Section 2001 ..... 1, 3, 30

12 U.S.C. Section 2121 24

12 U.S.C. Section 2131 .....4, 30

12 U.S.C. Section 2134 ..... *passim*

12 U.S.C. Section 2141 .....2, 3, 4, 12, 24

21 U.S.C. Section 2211 37

12 U.S.C. Section 2214 .....20, 37

31 U.S.C. Section 742 .....17, 25

TABLE OF AUTHORITIES – Continued

Page

Federal Farm Loan Act of 1916, 64th Cong., 1st Sess., Ch. 245, 39 Stat. 360.....4, 5

§ 4, 39 Stat. 362 4

§ 21, 39 Stat. 377 5

§ 26, 39 Stat. 380 5

Farm Credit Act of 1933, Pub. L. No. 73-98, 48 Stat. 257 .....6, 15

§ 63, 48 Stat. 267 15

Farm Credit Act of 1971, Pub. L. No. 92-181, 85 Stat. 583 .....6, 7, 15

§ 1.13, 85 Stat. 587 15

Farm Credit Amendments Act of 1985, Pub. L. No. 99-205, 99 Stat. 1678.....7, 8, 9, 10, 34

§ 101, 99 Stat. 1678..... 8

§ 103, 99 Stat. 1680.....7, 8, 34

§ 104, 99 Stat. 1687..... 9

Agricultural Credit Act of 1987, Pub. L. No. 100-233, 101 Stat. 1568 (1987) 3, 12, 15, 34

§ 201, 101 Stat. 1597..... 34

§ 413, 101 Stat. 1639..... 12

§ 415, 101 Stat. 1642.....3, 15

TABLE OF AUTHORITIES – Continued

Page

OTHER:

H.R. Rep. No. 171, 73d Cong., 1st Sess. (1933) 6, 31

H.R. Rep. No. 425, 99th Cong., 1st Sess. (1985) 3, 7, 9, 11, 33, 34

H.R. Rep. No. 295, 100th Cong. 1st Sess. (1987) 5

S. Rep. No. 144, 64th Cong., 1st Sess. (1916) 4, 31

S. Rep. No. 21, 92d Cong., 1st Sess. (1971) 28

S. Rep. No. 230, 100 Cong., 1st Sess. (1987) 12, 31

Farm Credit Admin., 1985 *Annual Report* 7

Farm Credit Admin., 1986 *Annual Report* 12

77 Cong. Rec. H4708 (May 31, 1933) 6

131 Cong. Rec. H11524 (Dec. 10, 1985) 8

131 Cong. Rec. H12529-12533 (Dec. 18, 1985) 12

131 Cong. Rec. S33405 (Nov. 22, 1985) 7, 8

131 Cong. Rec. S16710 (Dec. 3, 1985).....7, 8, 37

131 Cong. Rec. S16741-16752 (Dec. 3, 1985)..... 11

131 Cong. Rec. S11506-11530 (Dec. 10, 1985)..... 11

131 Cong. Rec. S17757 (Dec. 17, 1985)..... 11

131 Cong. Rec. S17820-17821 (Dec. 17, 1985)..... 11

H.R 3792, 99th Cong. (1985)..... 11

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., art. VI., cl. 2:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.

12 U.S.C. 2001(a)

> It is declared to be the policy of the Congress, recognizing that a prosperous, productive agriculture is essential to a free nation and recognizing the growing need for credit in rural areas, that the farmer-owned cooperative Farm Credit System be designed to accomplish the objective of improving the income and well-being of American farmers and ranchers by furnishing sound, adequate, and constructive credit and closely related services to them, their cooperatives, and to selected farm-related businesses necessary for efficient farm operations.

12 U.S.C. Section 2134:

> Each bank for cooperatives and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such bank shall be exempt, both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now and hereafter imposed by the United States or any State, territorial, or local taxing authority, except that interest on

such obligations shall be subject to Federal income taxation in the hands of the holder.

12 U.S.C. Section 2141

Charter, powers and operation

a. Charter

The National Bank for Cooperatives or the United Bank for Cooperatives, as the case may be (hereinafter in this part referred to as the "consolidated bank"), established under Section 413 of the Agricultural Credit Act of 1987, shall be a federally chartered instrumentality of the United States and an institution of the Farm Credit System.

b. Powers

The consolidated bank and the board of directors of such bank shall have all of the powers, rights, responsibilities and obligations of the district banks for cooperatives and the Central Bank for Cooperatives and the boards of directors of such banks except as otherwise provided for in this chapter.

c. Operation

The consolidated bank shall be organized and operated on a cooperative basis.

STATEMENT OF THE CASE

This case presents the question whether 12 U.S.C. Section 2134, authorizes states to tax the income of the National Bank for Cooperatives. To answer the question presented, it is important to consider the historical and

legislative context in which the Farm Credit System and the National Bank were established. Accordingly, the following summarizes the history and function of the Farm Credit System and the role of the National Bank for Cooperatives.

The National Bank for Cooperatives and its Role in the Farm Credit System

The National Bank for Cooperatives is a member institution of the Farm Credit System, created by Congress in 1987 with the mandate to provide reliable and affordable credit to eligible agricultural cooperatives. Agricultural Credit Act of 1987, Pub. L. No. 100-233, § 415, 101 Stat. 1568, 1642. The National Bank for Cooperatives is designated by Congress as a "federally chartered instrumentality of the United States." 12 U.S.C. Section 2141(a).

Congress created the Farm Credit System to provide essential credit to agricultural producers and their agricultural cooperatives. 12 U.S.C. Section 2001. At each point in the development of the System, Congress was guided by two concerns – the need to provide a reliable source of agricultural credit, and the need to provide such credit at the lowest possible cost. The Farm Credit System is the single most important lender to American agricultural producers, accounting for one/third of all agricultural loans. H.R. Rep. No. 425, 99th Cong., 1st Sess., 7 (1985).

The institutions of the Farm Credit System, including the National Bank for Cooperatives, operate on a cooperative basis. 12 U.S.C. Section 2141(c).[1] Because they are cooperatives, Farm Credit System institutions do not operate for their own profit but for the benefit of their borrowers. Each institution is obligated by Congress to set interest rates "[a]t the lowest reasonable cost on a sound business basis." 12 U.S.C. Section 2131(a). Income generated by the institutions is used to offset loan losses or is returned to borrowers to reduce their borrowing costs. See the discussion of the System's cooperative operations in *Federal Land Bank v. Kiowa County*, 368 U.S. 146, 151-152 (1961).

The first System institutions, the Federal Land Banks and Federal Land Bank Associations, were formed pursuant to the Federal Farm Loan Act of 1916, 64th Cong., 1st Sess., Ch. 245, § 4, 39 Stat. 360, 362 (1916). They were created to provide long-term credit to farmers. S. Rep. No. 144, 64th Cong., 1st Sess. 2-3 (1916).

Congress recognized that long-term credit was not available from commercial banks but that it was available from other sources. *Id.* Congress also recognized that a

---

[1] Each borrower is required to purchase stock in a specified amount as a condition of receiving a loan. See e.g. 12 U.S.C. Section 2130. The stock may not be transferred or redeemed except with the Farm Credit System institution's consent. 12 U.S.C. Section 2124(c). The stock is only redeemable at par, i.e., the same price initially paid. 12 U.S.C. Section 2126. Regardless of the amount of stock the borrower must purchase, the borrower generally has only one vote on matters affecting the Farm Credit System institution's operations. 12 U.S.C. Section 2124(d).

federal conduit or bridge was needed to connect long-term investors with the farmers:

> We are asked to furnish the bridge which shall bring them in touch, or rather to grant a franchise to those who will build the bridge if we will construct the approaches. *Such we conceive to be a proper function of the Government.*

Id. (emphasis added).

To connect investors and farmers, the Federal Land Banks were authorized to issue long-term bonds. The bonds were secured by a pool of farm mortgages. By this mechanism, funds became available for long-term loans to individual farmers at a low cost. *Id.* at 4-5.

To further reduce the cost of funds, Congress provided a tax exemption for Federal Land Bank bonds. 64th Cong., 1st Sess., Ch. 245, §§ 21, 26, 39 Stat. 360, 377, 380 (1916). This reduced the interest rate required to induce private investors to invest in Land Bank bonds. Federal sponsorship also helped their marketability. As a later Congress observed, federal sponsorship afforded the Farm Credit System's bonds "a preferred place in the Nation's money markets." H.R. Rep. No. 295, 100th Cong. 1st Sess. 55 (1987).

In 1933, Congress addressed the need for short-term production loans for farmers and their agricultural cooperatives. Direct federal lending was ruled out because:

> [i]t is too expensive, it cannot be sufficiently flexible to meet local needs, and for other reasons is not a satisfactory method of furnishing essential credit.

H.R. Rep. No. 171, 73d Cong., 1st Sess. 1-2 (1933). Private credit was also ruled out because it was either unavailable or too expensive. Congress noted:

> Such institutions as have been financing agricultural production have charged rates of interest which frequently make the farmer a perpetual debtor of his financing agency.

Id. Congress again turned to the cooperative model and created and capitalized the Banks for Cooperatives and the Production Credit Associations. See Farm Credit Act of 1933, Pub. L. No. 73-98, 48 Stat. 257 (1933). Banks for Cooperatives bonds, like Federal Land Bank bonds, were exempted from tax. Pub. L. No. 73-98, § 63, 48 Stat. 257, 267 (1933).

The Bank for Cooperatives were themselves designated "federally chartered instrumentalities of the United States," and exempted from state and federal taxes, except property taxes. *Id.* Apparently because government tax revenues had been severely depleted by the Depression economy, Congress agreed to authorize taxation of the Banks for Cooperatives during periods in which the federal government had no investment. See, 77 Cong. Rec. H4708 (May 31, 1933).

In 1971, Congress comprehensively revised and reenacted the legislation applicable to the Farm Credit System. Farm Credit Act of 1971, Pub. L. No. 92-181, 85 Stat. 583 (1971). By then, the government's initial investment in the Banks for Cooperatives had been retired. Nonetheless, Congress declared that the Banks for Cooperatives continued to be "federally chartered instrumentalities of

the United States." Pub. L. No. 92-181, § 1.13, 85 Stat. 583, 587 (1971).

A financial crisis struck the Farm Credit System in 1985. A combination of depressed agricultural prices, shrinking export markets, and falling agricultural land values created Depression like conditions for the System's borrowers. H.R. Rep. No. 425, *supra*, at 6. Because the Farm Credit System's statutory mandate is to lend to agricultural borrowers, and only agricultural borrowers, the System began to incur severe losses. In 1985, the System lost $2.7 billion. Farm Credit Admin., 1985 *Annual Report* 17. These losses eroded the Farm Credit System's capital base and raised the cost of issuing System bonds.

Traditionally, the interest rate demanded by the capital markets for Farm Credit System bonds was only 5 to 10 basis points (5/100 to 10/100 of 1 percent) over the rate for comparable United States Treasury obligations. H.R. Rep. No. 425, *supra*, at 7. By 1985, the interest rate premium was more than 1 percent. *Id.* This higher premium cost the System's agricultural borrowers an additional $300 million per year. 131 Cong. Rec. S33405 (Nov. 22, 1985) (Statement of Sen. Helms). Increasing the pressure for federal action to rescue the Farm Credit System was the fact that in early 1986, the Farm Credit System would have to refinance approximately $13 billion of previously issued bonds. Without explicit federal support, it was feared that any refinancing could be done only at prohibitive cost. *Id.*; 131 Cong. Rec. S16710 (Dec. 3, 1985) (Statement of Sen. Helms).

In response to the farm crisis, Congress enacted the Farm Credit Amendments Act of 1985, Pub. L. No. 99-205,

99 Stat. 1678 (1985). To coordinate financial assistance, Congress created the Farm Credit System Capital Corporation (the "Capital Corporation"). Pub. L. No. 99-205, § 103, 99 Stat. 1678, 1680 (1985). The Capital Corporation was given three sources of funds. First, the Farm Credit Administration was authorized to invest approximately $250 million of previously appropriated federal funds in the stock of the Capital Corporation. These funds could then be invested in the stock of distressed System institutions. Pub. L. No. 99-205, § 101, 99 Stat. 1678 (1985). Second, the Capital Corporation was authorized to require the System's solvent Banks and Associations to provide additional funds to assist distressed institutions. Pub. L. No. 99-205, § 103, 99 Stat. 1686 (1985). Third, the Capital Corporation was given a "line of credit" with the United States Treasury. Pub. L. No. 99-205, § 103, 99 Stat. 1683 (1985).

It was Congress's intent that the federal assistance "provide necessary reassurance to the investors of system securities to enable the system to continue to raise adequate funding at affordable cost." 131 Cong. Rec. S16710 (Dec. 3, 1985). Representative Coleman stated that the federal assistance was "critical" and the only means to "calm the fears on Wall Street so that the system can continue to raise sufficient funds to lend and keep borrowing costs and interest rates down." 131 Cong. Rec. H 11524 (Dec. 10, 1985). It was acknowledged that should all investor confidence be lost, "the system would use up its liquidity in only 18 days and then be in default." 131 Cong. Rec. S33405 (Nov. 22, 1985) (Statement of Sen. Helms). In light of this fact Senator Helms stated, "The implications of such a eventuality for agriculture and the

Nation's economy are severe. We cannot responsibly let this situation go unaddressed." *Id.*

The House Agricultural Committee summarized the case for federal assistance:

> Without question, the U.S. agriculture industry cannot afford the disintegration of the Farm Credit System. Moreover, American society has an important stake in the continued viability of the System.

H.R. Rep. No. 425, *supra*, at 11.

As part of Congress's program to centralize financial assistance, all System institutions were made liable to repay the federal government's advances to the Capital Corporation without regard to whether the institutions had themselves received federal assistance. Pub. L. No. 99-205, § 104, 99 Stat. 1687 (1985).[2] While they did not receive direct assistance, the National Bank for Cooperatives and its successor, CoBank, ACB, have contributed more than $350 million to repay federal assistance. *See*, CoBank, ACB, *Annual Reports* submitted to the Farm Credit Administration, 1990 – 1999. Because the Farm Credit Administration's new investments were through the Capital Corporation, Congress also repealed the Farm Credit Administration's authority to invest in individual

---

[2] The joint and several liability for advances made to the Capital Corporation was merely an extension of the joint and several liability previously established for System obligations. "[I]n 1977, consolidated system wide bonds and notes were introduced to combine the financial strength of the System. These securities are the joint and several obligations of all 37 Farm Credit Banks, making each bank individually liable." H.R. Rep. 425, *supra*, at 6.

Farm Credit System institutions. Pub. L. No. 99-205, § 101, 99 Stat. 1678 (1985).

As part of the Farm Credit Amendments Act of 1985, Congress amended 12 U.S.C. Section 2134, which deals with taxation of the Banks for Cooperatives. Prior to its amendment, Section 2134 contained three sentences. The first sentence provided:

> Each bank for cooperatives and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such bank shall be exempt, both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territorial, or local taxing authority.

The second sentence provided:

> Such banks, their property, their franchises, capital, reserves, surplus, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, territorial, or local taxing authority; except that interest on the obligations of such banks shall be subject only to Federal income taxation in the hands of the holder thereof pursuant to the Public Debt Act of 1941 (31 U.S.C. 742(a)) and except that any real and tangible personal property of such banks shall be subject to Federal, State, territorial, and local taxation to the same extent as similar property is taxed.

The third sentence provided:

> The exemption provided in the preceding sentence shall apply only for any year or part thereof in which stock in the bank for cooperatives is held by the Governor of the Farm Credit Administration.

The Farm Credit legislation introduced in the House on November 20, 1985, made no substantive change to Section 2134. It only amended the third sentence to delete the reference to the "Governor" of the Farm Credit Administration, a position which was eliminated in the proposed legislation. H.R. 3792, 99th Cong., § 205(e)(10), 58 (Nov. 20, 1985).

The Senate, which was considering Farm Credit relief at the same time as the House, passed a bill which made no change to Section 2134. S1884, 99th Cong. (1985), 131 Cong. Rec. S16741-16752 (Dec. 3, 1985). There is no committee report regarding the Senate bill.

After hearings, the House Agricultural Committee reported out a revised bill which proposed to delete all of the third sentence of Section 2134. H.R. Rep. 425, *supra*, 65. On December 10, 1985, the House passed a bill which deleted both the second and third sentences of Section 2134. 131 Cong. Rec. H11506-11530 (Dec. 10, 1985), 131 Cong. Rec. S17757 (Dec. 17, 1985).

The House and Senate then reconciled the two bills and adopted the House version which deleted both the second and third sentences of Section 2134. The reconciled bills passed the Senate on December 17, 1985, and the House on December 18, 1985. 131 Cong. Rec. S17820-17821 (Dec. 17, 1985), 131 Cong. Rec.

H12529-12533 (Dec. 18, 1985). There are no committee reports or floor comments explaining the reason for the decision to delete the second and third sentences of Section 2134.

During 1986, the Farm Credit System lost an additional $1.9 billion. Farm Credit Admin., 1986 *Annual Report* 4. Congress responded by enacting the Agricultural Credit Act of 1987, committing up to $4 billion of federal funds to recapitalize the Farm Credit System. Pub. L. No. 100-233, § 201, 101 Stat. 1597. Congress explained that it was necessary to recapitalize the System because private lenders – as they had also done during the Depression – suspended or significantly cut back their agricultural lending. Congress stated:

> This contraction in the number of institutions willing to supply credit to farmers makes it even more important that the FCS remain a viable source of credit to agriculture during good times and bad.

S. Rep. No. 230, 100 Cong., 1st Sess. 14 (1987).

To further reduce System expenses and loan costs to farmers, Congress authorized the consolidation of System institutions. Pub. L. No. 100-233, § 413(b)(4), 101 Stat. 1639. One such consolidation produced the National Bank for Cooperatives. The National Bank for Cooperatives was formed through the consolidation of ten existing district Banks for Cooperatives and the Central Bank for Cooperatives. The National Bank for Cooperatives succeeded to all of the "powers, rights, responsibilities and obligations" of its predecessor banks. 12 U.S.C. Section 2141(b).

The Proceedings Below

In *Arkansas v. Farm Credit Services of Central Arkansas*, 520 U.S. 821 (1997), this Court held that the Tax Injunction Act, 28 U.S.C. Section 1341, barred the lower federal courts from deciding whether states are authorized to tax Farm Credit System institutions. As a result, various Farm Credit System institutions commenced litigation on this issue in the state courts.

In two consolidated cases, *Production Credit Association of Southeastern Missouri, et al. v. Director of Revenue*, and *CoBank, ACB, as Successor to the National Bank for Cooperatives v. Director of Revenue*, 10 S.W.3d 142 (Mo. 2000), the Missouri Supreme Court held that Missouri could not tax the income of Production Credit Associations or the National Bank for Cooperatives. The court held that the institutions are federal instrumentalities, subject to Missouri income tax only if Congress has authorized such taxation. *Id.* at 143. After reviewing the relevant statutes, the court determined that Congress had not authorized Missouri to tax the income of the Production Credit Associations or the National Bank for Cooperatives. *Id.* The Missouri Supreme Court concluded by pointing out that its decision was consistent with decisions rendered by a number of other state courts. *Id.*

Missouri then filed a petition for certiorari with respect to the decision that the National Bank for Cooperatives is exempt from Missouri income tax. Missouri did not appeal the decision regarding the Production Credit Associations.

INTRODUCTORY STATEMENT REGARDING QUESTION PRESENTED

The Court's Order granting the petition for certiorari in this case states:

> The petition for a writ of certiorari is granted limited to the following question: "Does 12 U.S.C. Section 2134 authorize states to tax the income of the National Bank for Cooperatives, a federally chartered instrumentality of the United States?"

120 S. Ct. 2716. Missouri and the United States, as an *amicus* in support of Missouri, have each changed the question presented in an attempt to sidestep the issue of whether Congress has *authorized* the states to tax the National Bank for Cooperatives. Missouri asserts that it may tax the Bank without congressional authorization. Because Missouri has challenged the need for congressional authorization, this brief will review the decisions of this Court which make authorization necessary. The brief then turns to the question presented.

SUMMARY OF THE ARGUMENT

In *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), this Court held that states may not tax federal instrumentalities absent congressional authorization. The Court announced two limitations which are relevant to the statutory construction arguments made by Missouri and the United States. The *McCulloch* rule does not apply to interests in federal instrumentalities held by private

investors, and does not apply to the real property of federal instrumentalities.

Over the years the Court extended the *McCulloch* rule to apply to private contractors doing business with the federal government, and to employees of federal instrumentalities. Beginning in the 1930's, the Court began overturning these extensions. See e.g., *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937), *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939). While returning *McCulloch* to its original reach, the Court reaffirmed *McCulloch's* core holding that federal instrumentalities in the form of fiscal institutions chartered by Congress are immune from state tax absent congressional authorization.

The National Bank for Cooperatives is indisputably a federal instrumentality. Its predecessor Banks for Cooperatives were so designated by Congress in 1933. Pub. L. No. 73-98, § 63, 48 Stat. 267. Their status was reconfirmed by Congress in 1971. Pub. L. No. 92-181, § 1.13, 85 Stat. 587. The National Bank for Cooperatives was designated by Congress as a federal instrumentality in 1987. Pub. L. No. 100-233, § 415, 101 Stat. 1642.

The National Bank for Cooperatives is designated a federal instrumentality because it performs an important governmental function – the provision of essential credit to agricultural cooperatives at the lowest possible cost. This Court has repeatedly confirmed the Farm Credit System's governmental function. See e.g., *Federal Land Bank v. Priddy*, 295 U.S. 229 (1935); *Federal Land Bank v. Bismarck Lumber*, 314 U.S. 95 (1941); *Federal Land Bank v. Kiowa County*, 368 U.S. 146 (1961); and *Memphis Bank &*

Trust Co. v. Garner, 459 U.S. 392 (1983). It is curious that neither Missouri nor the United States discuss these decisions.

Missouri claims that Congress's designation of the National Bank as a federal instrumentality is statutory surplusage. It is not. Congress is presumed to understand the important judicial precedents applicable to its legislation and expects that its enactments will be interpreted in conformity with such precedents. *Cannon v. University of Chicago*, 441 U.S. 677 (1979). By designating the National Bank for Cooperatives a federal instrumentality, Congress made the *McCulloch* rule applicable to the Bank.

The Rural Telephone Bank, which is modeled on the Federal Land Banks, provides a particularly apt illustration of Congress's understanding of the significance of the federal instrumentality designation. Congress made the Rural Telephone Bank exempt from state taxes simply by designating the Rural Telephone Bank an "instrumentality of the United States."

Missouri also claims that the Court's decision in *United States v. New Mexico*, 455 U.S. 720 (1981), announced a new rule which permits Missouri to tax the National Bank for Cooperatives without congressional authorization. Missouri relies upon the Court's statement that an instrumentality is entitled to invoke *McCulloch* only if the activity being taxed is sufficiently connected to the government that it cannot be viewed as a separate activity. *Id.* at 735.

Missouri interprets the Court's statement out of context. The *New Mexico* decision involves private contractors. The statement summarizes the Court's prior

decisions which hold that contractors may be instruments of the federal government with regard to certain activities, but that they are also engaged in separate and distinct activities for profit. It is these separate, private, non-governmental activities to which the Court's statement refers. This understanding is confirmed in the Court's subsequent decision in *Arizona Department of Revenue v. Blaze Construction Co.*, 526 U.S. 32, 37 (1999).

Missouri's reliance on *New Mexico* in this case is wrong for a second reason. All of the activities of the National Bank for Cooperatives are in furtherance of its governmental function – lending to its eligible cooperative borrowers at the lowest possible cost. *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95 (1941) (rehabilitation of repossessed building in furtherance of core governmental function), *Federal Land Bank v. Kiowa County*, 368 U.S. 146 (1961) (sale of mineral rights at a profit in furtherance of core governmental function), *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392 (1983) (Farm Credit System bonds are considered "other obligations of the United States" under 31 U.S.C. Section 742 because they are an integral part of the federal government's efforts to secure credit without state interference). In light of these decisions, the Bank's activities are exempt under the standard enunciated in *United States v. New Mexico*.

On its face, 12 U.S.C. Section 2134 does not authorize states to tax the income of the National Bank for Cooperatives. Absent exceptional circumstances, the Court will not look behind the words of the statute. *Burlington Northern R.R. Co. v. Oklahoma Tax Commission*, 481 U.S. 454, 461 (1987). This case presents no reasons for disregarding the statute.

If this Court decides to examine the legislative history regarding the 1985 amendment of Section 2134, the Court should begin with the circumstances facing Congress and its policy goals. Congress enacted the Farm Credit Amendments Act of 1985 in the face of a severely distressed Farm Credit System, the capital market's loss of confidence in System bonds, and crippling borrowing costs for the System's agricultural borrowers.

Congress acted to revitalize the System and drive down borrowing costs by centralizing financial support through the Capital Corporation and by providing a "line of credit" from the United States Treasury to reassure the capital markets of federal financial support. The new federal assistance was provided to the Capital Corporation, which then directed such assistance to System institutions. The Banks for Cooperatives were made jointly liable to repay this assistance, just as if they had received it directly from the United States.

The circumstances facing Congress, the declared policy of reducing loan costs to farmers, and the provision of new federal assistance are consistent with the conclusion that Congress did not intend to authorize the states to tax the Banks for Cooperatives. By contrast, authorizing the states to tax the Banks for Cooperatives would hinder the accomplishment of Congress's goals.

The statutory construction arguments offered by Missouri and United States, as amicus, are meritless. The United States argues that the National Bank for Cooperative's claim of immunity would make the first sentence of Section 2134 (which exempts the Bank's bonds from state tax) surplus language. U.S. Amici 14. This assertion was

answered by this Court when it reviewed the same statutory exemptions applicable to Federal Land Banks. *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941). The Court pointed out that bonds issued by the Land Banks to private holders would otherwise be taxable even though the Banks themselves are exempt. Thus, the statutory exemption for the bonds is unrelated to the immunity of the Banks.

The United States also asserts that the National Bank for Cooperatives claims immunity from real property taxes. U.S. Amici 19. The National Bank for Cooperatives has never claimed and cannot claim immunity from real property taxes. Real property of federal instrumentalities is subject to state tax absent a separate statutory exemption. *McCulloch*, 17 U.S. (4 Wheat.) at 436.

Missouri and the United States also claim that Congress would not have made an important change to the states' authority to tax the Banks for Cooperatives without explanation and in the form of a conforming amendment. This claim assumes that Congress made an important change to the states' authority. It did not. For over fifty years the states have been prohibited from taxing the Banks when federal funds are invested in the Banks. With the new federal support provided in 1985, Congress simply conformed Section 2134 to the fact of that new federal assistance.

Missouri and the United States argue that because Congress enacted statutory exemptions for other Farm Credit System institutions, it must have intended that the Banks for Cooperatives are taxable. When Congress intends Farm Credit System institutions to be taxable, it

uses explicit language. See 12 U.S.C. Section 2214. This argument also ignores the example of the Rural Telephone Bank which is exempted from state tax without a separate statutory exemption.

All parties agree that the state taxability of the National Bank for Cooperatives is a matter for Congress, and Congress alone. Congress, understanding the significance of the federal instrumentality designation, has acted and has not authorized states to tax the income of the National Bank for Cooperatives.

ARGUMENT

In *McCulloch v. Maryland*, this Court established the rule that entities created by Congress to perform a governmental function are exempt from state taxation absent congressional authorization. Such entities are exempt because state taxation interferes with the performance of their governmental function. This case presents a straightforward illustration of the reason for this rule. The National Bank for Cooperatives was created by Congress to provide loans to its agricultural cooperative borrowers at the lowest possible cost. Because it is a cooperative, state taxes are necessarily passed on to its borrowers through higher costs.

A federal instrumentality may have characteristics of a private business without losing its immunity from state taxation. The instrumentality at issue in *McCulloch*, the Second Bank of the United States, was essentially a private, for-profit entity. It had full banking powers, its stock was primarily owned by private individuals who

controlled the board of directors, and it operated for the profit of those private shareholders. Nonetheless, Chief Justice Marshall concluded that it was a public corporation created for public purposes. *Osborn v. Bank of United States*, 22 U.S. 738, 860 (1824).

While a federal instrumentality is itself immune from state taxation, *McCulloch* also held that investments in the federal instrumentality held by private parties are taxable. The Court stated: "[t]ax may be imposed on the interests which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State." *McCulloch*, 17 U.S. (4 Wheat.) at 436. The real property of a federal instrumentality is also subject to tax. Exemption "does not extend to a tax paid on the real property of the bank, in common with other real property within the state." *Id.* The statutory construction arguments offered by Missouri and the United States ignore these aspects of *McCulloch*.

I. Fiscal Institutions Chartered by Congress Are Federal Instrumentalities and Immune from State Taxation Absent Congressional Authorization

Over the years, this Court extended *McCulloch* to contractors doing business with the federal government and employees of federal instrumentalities. *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937), is acknowledged as the case which initiated the return of *McCulloch* to its core principle. *United States v. New Mexico*, 455 U.S. at 731. *James v. Dravo* involved the taxability of a federal contractor. In the course of its opinion, the Court stated:

> The tax is not laid upon an instrumentality of the Government. *McCulloch v. Maryland*, 4 Wheat. 316; *Osborn v. Bank of the United States*, 9 Wheat. 738; *Gillespie v. Oklahoma*, 257 U.S. 501; *Federal Land Bank v. Crosland*, 261 U.S. 374; *Clallam County v. United States*, 163 U.S. 341; *New York ex rel. Rogers v. Graves*, 299 U.S. 401. Respondent is an independent contractor.

James v. Dravo, 302 U.S. at 149.

Graves v. New York ex rel. O'Keefe, 306 U.S. 466 (1939), is the leading case on the taxation of federal employees. *Graves v. O'Keefe* involved the state taxation of an employee of a federal instrumentality. Before concluding that the employee was subject to state tax, the Court stated:

> [a]ll activities of government constitutionally authorized by Congress must stand on a parity with respect to their constitutional immunity from taxation. *McCulloch v. Maryland*, 4 Wheat. 316, 432; *Van Brocklin v. Tennessee*, 117 U.S. 151, 158-159; *South Carolina v. United States*, 199 U.S. 437, 451-452; *Helvering v. Gerhardt*, 304 U.S. 405, 412-415.

306 U.S. at 477. Thus, while the Court denied immunity to an employee of a federal instrumentality, the Court again reaffirmed the core holding of *McCulloch*.

In contrast to its decisions regarding contractors, et al., the Court has repeatedly affirmed the applicability of *McCulloch* to federal instrumentalities in the form of fiscal institutions chartered by Congress. In *First Agricultural National Bank of Berkshire County v. State Tax Commission*,

392 U.S. 339 (1968), the Court pointed out that a long line of its decisions:

> [h]as firmly established the proposition that the States are without power, unless authorized by Congress, to tax federally created, or, as they are presently called, national banks.

Id. at 340, and that:

> As recently as 1966, Mr. Justice Fortas, speaking for a unanimous Court, thought this ancient principle so well established that he used national banks as an example in holding the American Red Cross immune from state taxation.

Id. at 340-341. Because Congress had clearly not authorized the state tax in question, the Court did not address the state's argument that national banks, in their modern guise, are no longer federal instrumentalities. *Id.* at 341. In subsequent cases the Court has addressed this question and reaffirmed that national banks are federal instrumentalities. See e.g. *Marquette National Bank v. First of Omaha Corp.*, 439 U.S. 299, 307 (1978): "Omaha Bank is a national bank; it is an [instrumentality] of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States."

One point in the *Agricultural National Bank* decision deserves additional comment. In deciding that Congress had not authorized the challenged state tax, the Court pointed out that Congress legislated with full knowledge of the judicial precedents which hold that states may only impose those taxes authorized by Congress. *Agricultural National Bank*, 392 U.S. at 343.

In recent years, the lower federal courts have relied upon the *Agricultural National Bank* decision to find that other federally chartered fiscal institutions are entitled to invoke the *McCulloch* rule. *United States v. State Tax Commission*, 481 F.2d 963, 969 (1st Cir. 1973) (federal savings and loan associations); *Federal Land Bank of Wichita v. Board of County Commissioners*, 788 F.2d 1440, 1441 (10th Cir. 1986) (federal land banks); and *United States v. Michigan*, 851 F.2d 803, 807 (6th Cir. 1988) (federal credit unions). These decisions confirm the uniform understanding that fiscal institutions chartered by Congress are entitled to invoke the *McCulloch* rule.

II. The National Bank for Cooperatives Is a Fiscal Institution Chartered by Congress, and Is by Express Designation and its Governmental Function a Federal Instrumentality Immune from State Taxation Absent Congressional Authorization

Congress designated the National Bank for Cooperatives a "federally chartered instrumentality of the United States". 12 U.S.C. Section 2141(a). The Banks for Cooperatives enjoy a similar designation. 12 U.S.C. Sections 2121 and 2134. These congressional designations establish the Banks' right to invoke the immunity of the *McCulloch* rule.

Congress designated the National Bank for Cooperatives a federal instrumentality in recognition of the governmental function performed by the Bank and the rest of the Farm Credit System. This Court has repeatedly confirmed that the Farm Credit System performs an important governmental function by providing reliable credit to

agricultural producers at the lowest possible cost. Two of the Court's decisions are particularly instructive.

In *Federal Land Bank v. Kiowa County*, 368 U.S. 146 (1961), the issue was whether mineral interests held by the Federal Land Bank for profitable disposition were exempt from tax. The taxing authority claimed that such profit making activities are not part of the Land Bank's governmental function. The Court responded:

> The purpose of the Federal Farm Loan Act and its subsequent amendments was to provide loans for agricultural purposes at the lowest possible interest rates. One method of keeping the interest rate low is to authorize the federal land bank to make a profit to be distributed to the shareholders in the form of dividends.

Id. at 151-152. This decision confirms the governmental role performed by the Farm Credit System, and confirms that the generation of profits to reduce borrower interest costs is integral to the performance of the system's governmental activity. See also *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 102 (1941) (same regarding repair of repossessed property).

The second case, *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392 (1983), involves the scope of 31 U.S.C. Section 742. This statute codifies the *McCulloch* rule as applied to obligations of the United States and provides in relevant part:

> Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority.

Id. at 395. The question before the Court was whether Tennessee could include bonds issued by the U.S. Treasury and the Farm Credit System in the measure of a tax on commercial banks. Concluding that Tennessee could not, the Court first repeated that Farm Credit System Banks are federal instrumentalities:

> There are 37 Farm Credit Banks: 12 Federal Land Banks, 12 Federal Intermediate Credit Banks, and 13 Banks for Cooperatives. They are federal instrumentalities designed to provide a reliable source of credit for agriculture.

Id. at 395. The Court then held that Farm Credit System bonds are "other obligations of the United States":

> The exemption established in § 742 applies not only to Treasury notes and bills, but also to the obligations of such instrumentalities of the United States as Federal Farm Credit Banks. Cf. *Smith v. Davis*, 323 U.S. 111, 117 (1944) ("other obligations" must be interpreted "in accord with the long established Congressional intent to prevent taxes which diminish in the slightest degree the market value or the investment attractiveness of obligations issued by the United States in an effort to secure necessary credit").

Id. at 396. The Court concluded that:

> [O]ur cases have made no distinction between the obligations of the United States Treasury and the obligations of the Federal Credit Banks.

Id. This decision highlights the essential governmental credit function performed by the Farm Credit System.

In light of *Kiowa County* and *Memphis Bank & Trust*, the Court's statement in *Arkansas v. Farm Credit Services of Central Arkansas*, that the interests of the Farm Credit System are not "coterminous with those of the Government," 520 U.S. at 821, should be understood to describe the relationship of the Government and the Farm Credit System for purposes of federal court jurisdiction. This statement should not be interpreted to apply for purposes of an exemption from state taxation.

Despite the Court's repeated recognition of the governmental role played by the Farm Credit System, Missouri claims that Congress's designation of the System's institutions as federal instrumentalities is mere surplusage.[3] This view is fundamentally disrespectful of Congress. Congress is presumed to understand the important judicial precedents applicable to its enactments. Congress also expects that legislation which it enacts will be interpreted in conformity with such precedents. *Cannon v. University of Chicago*, 441 U.S. 677, 698-699 (1979).

---

[3] The United States attempts to minimize the federal instrumentality designation by claiming that Congress has awarded that designation "scores" of times. U.S. Amici 21. Except for Farm Credit System institutions, there are only four federally chartered corporations which are currently designated as federal instrumentalities: the Rural Telephone Bank, 7 U.S.C. Section 941(c); the Federal Financing Bank, 12 U.S.C. Section 2283; the Commodity Credit Corporation, 15 U.S.C. Section 714; and the United States Enrichment Corporation, 42 U.S.C. § 2279a (1994 ed.), repealed effective on date of privatization, Pub. L. No. 104-134, 110 Stat. 1321.

For over 150 years, this Court has repeatedly confirmed that fiscal institutions like the National Bank for Cooperatives are federal instrumentalities and exempt from state taxation unless Congress provides otherwise. Congress understands that when it designates one of its creations as a federal instrumentality, it automatically exempts the instrumentality from state taxation unless a separate enactment overrides the exemption.

A particularly apt illustration of this understanding is the Rural Telephone Bank. In 1971, Congress authorized the formation of the Rural Telephone Bank to provide financing for the construction of rural telephone systems. 7 U.S.C. Section 941. The Rural Telephone Bank is modeled on the Federal Land Banks. S. Rep. No. 21, 92d Cong., 1st Sess. (1971). The legislative history states that the Rural Telephone Bank has:

> Exemption from U.S., State, and local taxes (with authority, but no obligation, to make payments in lieu of taxes on real and tangible personal property previously subject to such taxes).

S. Rep. No. 21, *supra*, at 1. The relevant statutory provision, 7 U.S.C. Section 941(c), does not contain a separate state tax exemption. Section 941(c) states only that: "The telephone bank shall be deemed to be an instrumentality of the United States . . . " and goes on to authorize payments in lieu of property taxes.[4] Congress understands that it is only necessary to designate the Rural

---

[4] 7 U.S.C. Section 941(c) states: Status; payment in lieu of property taxes. The telephone bank shall be deemed to be an instrumentality of the United States, and shall, for the purposes of jurisdiction and venue, be deemed a citizen and resident of the District of Columbia. The telephone bank is authorized to make payments to State, territorial, and local governments in lieu of property taxes upon real property and tangible personal property which was subject to State, territorial, and local taxation before acquisition by the telephone bank. Such payment may be in the amounts, at the times, and upon such terms as the telephone bank deems appropriate but the telephone bank shall be guided by the policy of making payments not in excess of the taxes which would have been payable upon such property in the condition in which it was acquired.

Telephone Bank as an "instrumentality of the United States" to establish the state tax exemption. Congress understands that designating the National Bank for Cooperatives a "federally chartered instrumentality of the United States" has the same effect.

III. The Decision in *United States v. New Mexico* Does Not Permit States to Tax the National Bank for Cooperatives Without Congressional Authorization

Missouri's principal argument is that the Court's decision in *United States v. New Mexico* announced a new contraction of the *McCulloch* rule which makes the National Bank for Cooperatives subject to state taxation without regard to congressional authorization. Pet. Br., 16. Missouri misreads the *New Mexico* decision.

New Mexico involved the taxation of government contractors. The opening line states:

> We are presented here with a recurring problem: to what extent may a State impose taxes on contractors that conduct business with the Federal Government?

New Mexico, 455 U.S. at 722. The United States itself denied that the contractors involved were federal instrumentalities. *Id.* at 725. The opinion focuses exclusively on the Court's prior cases involving federal contractors. *Id.* at 730-735. *Arizona Dept. of Revenue v. Blaze Construction Co.*, 526 U.S. 32 (1999), confirms that the *New Mexico* decision is directed at government contractors, not federal instrumentalities. The Court stated in discussing *New Mexico*: "the contractors could not be considered agencies or instrumentalities of the Federal Government." 526 U.S. at 37.

The statement in *New Mexico* that:

> tax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned

455 U.S. at 735, is also directed at contractors. This statement simply reaffirms the Court's prior holdings that federal contractors engage in "a separate and distinct taxable activity." *Id.* at 735, citing *United States v. Boyd*, 378 U.S. 39, 44 (1964). Contractors, even if they are instrumentalities for certain purposes, are taxable with respect to their own proprietary activities.

Even if the *New Mexico* decision did announce a new rule, the National Bank for Cooperatives comes within that rule. Congress created the Farm Credit System to perform the governmental function of providing reliable low-cost credit to agricultural producers and their cooperatives. See 12 U.S.C. Sections 2001, 2131(a). Congress

acted because such credit was not available from private sources. S. Rep. No. 144, *supra*, at 2-3 (1916), H.R. Rep. No. 171, *supra*, at 2 (1933), S. Rep. No. 230, *supra*, at 14 (1987).

This Court's decisions concur. The Farm Credit System's governmental function is to provide reliable credit to farmers at the lowest possible cost. *Kiowa County*, 368 U.S. at 151-152. The generation of profits is an integral part of that function. *Id.*, see also *Bismarck Lumber Co.*, 314 U.S. at 100. As a cooperative, any income redounds to the benefit of its borrowers in the form of lower costs. *Kiowa County*, 368 U.S. at 151-152. Farm Credit System bonds are considered "other obligations of the United States" for purposes of 31 U.S.C. Section 742, because they are part of the federal government's credit operations. *Memphis Bank & Trust*, 459 U.S. at 396. In sum, the National Bank for Cooperatives' activities are governmental and entitled to immunity under *McCulloch* and *New Mexico*. To read *New Mexico* otherwise conflicts with the Court's longstanding recognition of the instrumentality status of Farm Credit System institutions and the governmental function that they perform.

IV. 12 U.S.C. Section 2134 is Unambiguous and Does Not Authorize States to Tax the National Bank for Cooperatives

As amended in 1985, 12 U.S.C. Section 2134 provides:

> Each bank for cooperatives and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such bank shall be exempt,

> both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now and hereafter imposed by the United States or any State, territorial, or local taxing authority, except that interest on such obligations shall be subject to Federal income taxation in the hands of the holder.

On its face, 12 U.S.C. Section 2134 does not authorize states to tax the National Bank for Cooperatives. Neither Missouri nor the United States claims otherwise. They argue only that various rules of statutory construction *imply* that Congress intended to authorize the states to tax the Banks for Cooperatives.

Where a statute is unambiguous, this Court ordinarily refuses to look behind the statutory language:

> Unless exceptional circumstances dictate otherwise, "[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete." *Rubin v. United States*, 449 U.S. 424, 430 (1981).

Burlington Northern R.R. Co. v. Oklahoma Tax Commission, 481 U.S. 454, 461 (1987). This case presents no circumstances which justify further judicial inquiry. Section 2134 should be understood and interpreted according to its terms – no state authorization to tax.

Missouri suggests that *Mayo v. United States*, 319 U.S. 441 (1943), permits this Court to determine that Congress has impliedly authorized states to tax the National Bank for Cooperatives when Congress is silent on the question of authorization. Missouri is mistaken.

In *Mayo*, the Court stated:

> The silence of Congress as to the subjection of its instrumentalities, other than the United States, to local taxation or regulation is to be interpreted in the setting of the applicable legislation and the particular exaction. *Shaw v. Gibson-Zahniser Oil Corp.*, 276 U.S. 575, 578.

319 U.S. at 447. The cited language from *Shaw v. Gibson-Zahiser Oil Corp.* is:

> What governmental instrumentalities will be held free from state taxation, though Congress has not expressly so provided, cannot be determined apart from the purpose and character of the legislation creating them.

276 U.S. at 578. *Shaw* points out that certain instrumentalities are sufficiently connected to the government that "nothing short of an express declaration by Congress would have subjected them to state taxation" and explains that national banks are included in this category. *Id.* at 578-579. *Shaw* recognizes that federally chartered fiscal institutions like the national banks are categorically exempt from state tax when Congress is silent. *Mayo* should be similarly interpreted. Because Congress is silent, the National Bank for Cooperatives is categorically exempt from state taxation.

If the Court concludes that it is appropriate to explore Congress's intent regarding the 1985 amendment to Section 2134, the examination should focus, as *Mayo* directs, on "the setting of the applicable legislation and the particular exaction." *Mayo*, 319 U.S. at 441. The 1985 amendment was adopted against the backdrop of a Farm Credit System threatened by increasing losses, H.R. Rep.

No. 425, *supra*, at 6-7, rising interest rates which made credit unaffordable to many farmers, *Id.*, the capital market's loss of confidence in the System's bonds, H.R. Rep. No. 425, *supra*, at 7, recognition that U.S. agriculture could not afford the disintegration of the Farm Credit System, H.R. Rep. No. 425, *supra*, at 11, and finally, recognition of the need for a federal guarantee to assure the System's survival. H.R. Rep. No. 425, *supra*, at 12.

Congress responded by reorganizing the System's finances to assure that all resources would be available to support distressed System institutions and by providing a federal "line of credit". Pub. L. No. 99-205, § 103, 99 Stat. 1683. These actions were intended to stabilize the System and drive down borrower loan costs. It was in the process of resolving these problems that Congress amended Section 2134.

Prior to the 1985 amendment, Section 2134 authorized the states to tax the Banks for Cooperatives during periods in which the government did not own stock. It is implausible that in 1985, Congress intended to broaden this prior limited authorization and permit states the unfettered right to tax the Banks for Cooperatives. The Farm Credit System was in crisis and the rates which it was required to charge its borrowers were unsupportable. New federal assistance was provided through a "line of credit" and later a $4 billion appropriation. Pub. L. No. 100-233, § 201, 101 Stat. 1597. While the new federal support was provided indirectly through the conduit of the Capital Corporation, this fact is of no significance. The Banks for Cooperatives were liable to repay this support in the same manner as if they had received it directly.

Thus, the circumstances of the 1985 amendment support the conclusion that Congress fully intended to deny the states the right to tax. Denying the states the right to tax the Banks for Cooperatives is fully consistent with Congress's policy goals. It would reduce the drain on System funds, reduce borrower costs, and increase the funds available to repay the Treasury.

Missouri, and the United States, ignore the context in which Section 2134 was amended. They rely, instead, on abstract rules of statutory construction to discern congressional intent. For example, the United States argues that if Banks for Cooperatives are immune under *McCulloch*, the exemption for the Banks for Cooperatives' bonds in Section 2134 is statutory surplusage. U.S. Amici 14. This argument was answered by the Court in *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95 (1941). There the Court examined Section 26 of the Farm Credit Act of 1933, which contained identical statutory exemptions for the Federal Land Banks and Land Bank bonds. Congress explained that there is no relationship between the two statutory exemptions. The Court stated:

> The additional exemptions granted to farm loan bonds and first mortgages executed to the land banks are proper additions to the general exemption of § 26. The bonds may be held by private persons, and, of course, the general exemption of § 26 would not extend to them.

314 U.S. at 100. The Court's analysis is consistent with *McCulloch's* holding that while a federal instrumentality is itself exempt, "[t]ax may be imposed on the interests

which the citizens of Maryland may hold in this institution." *McCulloch*, 17 U.S. (4 Wheat.) at 436. Thus, a determination that the states are not authorized to tax the Banks does not make the bond exemption surplusage.

The United States and Missouri also claim that the National Bank for Cooperatives' reading of Section 2134 would make it exempt from real property taxes and that Congress cannot have intended such a result. Pet. Br. 25-26, U.S. Amici 19. This claim is unfounded and has been so since *McCulloch*. That decision specifically stated that immunity "does not extend to a tax paid on the real property of the bank, in common with other real property within the state." *McCulloch*, 17 U.S. (4 Wheat.) at 436.

Missouri and the United States also claim that Congress would not have made an important change in the states' authority to tax the Banks for Cooperatives without some comment. Pet. Br. 24, U.S. Amici 15-16. There are two answers to this claim. First, Congress did not make an important change in the law. For over 50 years, the Farm Credit Act provided that the states were not authorized to tax the Banks for Cooperatives during periods of federal investment. New federal support was provided in 1985. By amending Section 2134, Congress simply conformed the statute to the fact of such new federal investment.

There is a further reason for the lack of commentary on the amendment to Section 2134 – a lack of time. Due to the crisis facing the Farm Credit System, Congress considered the Farm Credit legislation "under the unusual circumstances of a limited time agreement, and without the customary process of the committee markup and

report." 131 Cong. Rec. S16710 (Dec. 3, 1985) (Statement of Sen. Helms). The legislation to rescue the Farm Credit System was introduced on November 20, 1985, and passed less than one month later. Given the time constraints, it is not surprising that Congress did not provide a specific explanation of the amendment to Section 2134.

Missouri and the United States similarly claim that the amendment to Section 2134 was described by Congress as a "conforming" amendment and thus must have been viewed as insignificant. Pet. Br. 24, U.S. Amici 15. This is simply a variation on the previous argument and the answer is the same. Congress conformed Section 2134 to the fact of new federal investment.

Missouri and the United States finally allege that because Congress gave statutory state tax exemptions to other institutions of the Farm Credit System, it must have meant to deny such exemptions to the Banks for Cooperatives. Pet. Br. 23-24, U.S. Amici 18. When Congress wishes to make a System institution subject to state tax, it does so expressly. In 12 U.S.C. Section 2211, Congress authorized the creation of Farm Credit System service corporations. In 12 U.S.C. Section 2214, Congress provided that the service corporations would be subject to state tax, except franchise taxes. Similarly, Missouri and its amici ignore the example of the Rural Telephone Bank which is state tax exempt without a statutory exemption. These examples negate any claim that Congress silently intended the Banks to be taxable.

In the end, none of these abstract canons of construction supports the conclusion that the plain terms of Section 2134 should be disregarded. All that they amount to

is the assertion that Congress must have intended to authorize the states to tax the Banks for Cooperatives because it did not specifically prohibit such taxation. This turns the *McCulloch* rule on its head. In amending Section 2134, Congress intended to, and did, deny the states the authority to tax the Banks for Cooperatives, and their successor, the National Bank for Cooperatives.

CONCLUSION

For the reasons stated, the decision of the Missouri Supreme Court should be affirmed.

Respectfully submitted,

RICHARD A. HANSON
Counsel of Record
THEODORE R. BOTS
MCDERMOTT, WILL & EMERY
227 West Monroe Street
Chicago, IL 60606-5096
(312) 984-7799

(12)

No. 99-1792

Supreme Court, U.S.
FILED
NOV 9 - 2000
CLERK

In the
SUPREME COURT OF THE UNITED STATES

NOV 9 2000

DIRECTOR OF REVENUE OF MISSOURI,
Petitioner,

v.

CoBANK, ACB, as Successor to the National Bank for Cooperatives,
Respondent.

On Writ of Certiorari to the Supreme Court of Missouri

REPLY BRIEF FOR PETITIONER

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri

JAMES R. LAYTON*
State Solicitor
GAIL VASTERLING
DAVID LIEBER
P.O. Box 899
Jefferson City, MO 65102
(573) 751-3321

**Counsel of Record*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONER 1

1. The line between entities with implied immunity from state taxation and those without is defined by the criteria in *United States v. New Mexico*. 2

2. Congress, by merely authorizing temporary, indirect federal financial assistance, did not confer broad tax immunity. 10

CONCLUSION 14

TABLE OF AUTHORITIES

CASES **Page**

Arkansas v. Farm Cred. Servs., 520 U.S. 821 (1997) . . . 5, 10

California State Bd. of Equalization v. Sierra Summit, Inc., 490 U.S. 844 (1989) 7

Davis v. Michigan Dep't of Treasury, 489 U.S. 803 (1989) 8

Federal Land Bank of St. Paul v. Bismarck Lumber Co., 314 U.S. 95 (1941) 5

Federal Land Bank v. Kiowa County, 368 U.S. 146 (1961) 5, 6

First Agricultural Nat'l Bank of Berkshire Cty. v. State Tax Comm'n, 392 U.S. 339 (1968) 13

James v. Dravo Contracting, 302 U.S. 134 (1937) 7

Jefferson County v. Acker, 527 U.S. 423 (1999) 6, 8

Massachusetts v. United States, 435 U.S. 444 (1978) 1

Memphis Bank & Trust Co. v. Garner, 459 U.S. 392 (1983) 8, 9

M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 5, 8, 10

Rohr Aircraft Corp. v. County of San Diego, 362 U.S. 628 (1960) 10

South Carolina v. Baker, 485 U.S. 505 (1988) 6, 9

United States v. County of Fresno, 429 U.S. 452 (1977) . . 10

United States v. New Mexico, 455 U.S. 720 (1982) . . 1, 6-9

STATUTES

12 U.S.C. § 2134 (1994) 3, 12

31 U.S.C. § 742 (1982) 9

36 U.S.C. § 130502 (Supp. IV 1998) 2

36 U.S.C. § 152502 (3) (Supp. IV 1998) 2

36 U.S.C. § 152702(a) (Supp. IV 1998) 2

36 U.S.C. § 20101(a) (Supp. IV 1998) 2

36 U.S.C. § 300101 (Supp. IV 1998) 2

36 U.S.C. § 70902 (Supp. IV 1998) 2

47 U.S.C. § 731 (1994) 2

7 U.S.C. § 941(c) (1994) 4

7 U.S.C. § 943 (b) (1994) 8

7 U.S.C. § 943 (e) (1994) 8

7 U.S.C. § 943(a) (1994) 4, 8

7 U.S.C. § 943(c) (1994) 4

Act of July 1, 1862, § 1, 12 Stat. 489 2

OTHER AUTHORITIES

H.R. Rep. No. 295, 100th Cong., 1st Sess. (1987), *reprinted in* 1987 U.S.C.C.A.N. 2723 11

H.R. Rep. No. 425, 99th Cong., 1st Sess. (1985), *reprinted in* 1985 U.S.C.C.A.N. 2587 11-13

No. 99-1792

In the
SUPREME COURT OF THE UNITED STATES

DIRECTOR OF REVENUE OF MISSOURI,

Petitioner,

v.

CoBANK, ACB, as Successor to the National Bank for Cooperatives,

Respondent.

On Writ of Certiorari to the Supreme Court of Missouri

REPLY BRIEF FOR PETITIONER

"[T]he political process is 'uniquely adapted to accommodating the competing demands'" of federal programs and state taxation. *United States v. New Mexico*, 455 U.S. 720, 737 (1982) (quoting *Massachusetts v. United States*, 435 U.S. 444, 456 (1978) (plurality opinion)). Contrary to the arguments set forth by respondent CoBank, that process did not, in 1985, result in the grant to Banks for Cooperatives (BFCs) of an immunity from state and local taxes beyond any they had ever

enjoyed – indeed, so broad as to be nearly unique among federally-chartered financial institutions.

1. The line between entities with implied immunity from state taxation and those without is defined by the criteria in *United States v. New Mexico*.

As the scope of federal activity has widened, both the numbers and kinds of entities that Congress has created to carry out its objectives have multiplied. Federally chartered organizations range from important national institutions such as the American National Red Cross (*see* 36 U.S.C. § 300101 (Supp. IV 1998)), to organizations with somewhat less national prominence, such as the Agricultural Hall of Fame (36 U.S.C. § 20101(a) (Supp. IV 1998)) and the National Ski Patrol System (36 U.S.C. § 152702(a) (Supp. IV 1998)). Congress has even authorized the creation of entirely private entities, such as ComSat (47 U.S.C. § 731), and the Union Pacific Railroad (Act of July 1, 1862, § 1, 12 Stat. 489). It is undisputed (indeed, nearly tautological) that entities created or otherwise endorsed by Congress perform governmental functions, that is, activities that Congress has determined to promote the national interest.[1] This Court has never held, as

---

[1] *See, e.g.*, 36 U.S.C. § 152502 (3) (Supp. IV 1998) (National Safety Council, a federally chartered corporation, is "to arouse and maintain the interest of the People of the United States . . . in safety and accident prevention"); 36 U.S.C. § 70902 (Supp. IV 1998) (purposes of Future Farmers of America, a federally chartered corporation, include "to develop character, train for useful citizenship, and foster patriotism, and thereby develop competent and aggressive rural and agricultural leadership"); 36 U.S.C. § 130502 (Supp. IV 1998) (Little League Baseball, Incorporated, a federally chartered

CoBank urges, that all federally chartered entities are automatically entitled to immunity, absent an express statutory waiver, from all state and local taxes. Clearly there are some entities that have automatic immunity by constitutional decree (which Congress may waive). For others, lacking constitutional immunity, Congress may provide immunity in whatever manner it wishes. Thus the first question in this case is what sort of entity CoBank is.

The line between entities whose immunity is implied or presumed, and those whose immunity is not, matters here because, as both the Director and CoBank make clear in their briefs, whether and how the states can tax BFCs depends on the meaning of what 12 U.S.C. § 2134 does not say. It does not expressly say whether states could impose an income tax on the BFCs. Nor, for that matter, does it expressly say whether states could impose franchise, sales, personal property, real property, or other taxes on BFCs. Did Congress thus leave BFCs immune from such taxes, an argument necessarily based on a claim that they were on the "implied immunity" side of the line? Or did it leave them subject to state and local taxation, as they would be on the "no immunity provided" side of the line? CoBank and the Director disagree as to the line between the two groups.

CoBank defines the line in two ways. First, it defines it according to labels, *i.e.*, it claims that merely being labeled a "federal instrumentality," or even just being a "federally chartered fiscal institution," is enough to place an entity in the

---

corporation, is "using the disciplines of the native American game of baseball, to teach spirit and competitive will to win, physical fitness through individual sacrifice, the values of team play, and wholesome well being through healthy social association.").

implied immunity group. Respondent's Brief (Resp. Br.) at 22-24. But in labeling the entities it authorizes, Congress has not shown the kind of consistency that would be required to permit labels to define the scope of implied immunity. That is demonstrated dramatically by the Rural Telephone Bank, invoked by CoBank. The Rural Telephone Bank is statutorily designated both as "an instrumentality of the United States" (7 U.S.C. § 941(c)), and as "an agency of the United States" (7 U.S.C. § 943(a)). The Bank is then made subject to the Government Corporation Control Act in the same manner and to the same extent as if it were included in the definition of "wholly owned Government corporation." 7 U.S.C. § 943(c). The kind of confusion created by use of overlapping and inconsistently defined terms like "agency," "instrumentality," and "government corporation" explains why CoBank is unable to cite authority for – or to even explain the logic behind – a claim that the line defining agencies with Supremacy Clause implied immunity hangs on Congress's choice of label. But it does explain why Congress has so consistently defined the precise scope of immunity given to federally chartered but privately owned entities. *See* Petitioner's Brief (Pet. Br.) at 23-26.

Second, CoBank suggests that the line can be drawn according to whether the entity "performs an important governmental function." Resp. Br. at 24-25. But besides being without precedential support, such a line is entirely unworkable in the absence of some definition of "important governmental function," which CoBank fails to provide. Any Congressionally chartered entity would claim that it "performs an important governmental function" and thus has implied tax immunity. And who is to prove otherwise? For both "important" and "governmental" are fluid concepts. And as demonstrated by their commercial competitors, the BFCs' "important governmental functions" may be performed even by

entirely private organizations. Federal contractors and federal employees, too, perform important governmental functions, yet they are not immunized from taxation by the Supremacy Clause. CoBank's proposed formulation is nothing more than a return to the expansive intergovernmental tax immunity doctrine, which held that any state tax that had an impact on federal operations was unconstitutional under *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). That is a doctrine that this Court has, at length, rejected. *See* Pet. Br. at 14-16.

By rejecting "important governmental functions" as the test for defining the scope of implied immunity, the Director does not suggest that whether a Congressionally-chartered entity performs "governmental functions" is unimportant. The fact that an entity will perform governmental functions is what empowers Congress to immunize it from taxation. That was suggested by this Court in *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95 (1941), which CoBank misreads (Resp. Br. at 24-5) to hold that a Farm Credit System institution is entitled to immunity by the force of the Supremacy Clause alone. In *Bismarck Lumber*, this Court held that Congress has the power to provide such immunity pursuant to the Necessary and Proper Clause. *Id.* at 102-03 ("Congress has authority to prescribe tax immunity for activities connected with, or in furtherance of, the lending functions of federal credit agencies"). *See also Arkansas v. Farm Cred. Servs.*, 520 U.S. 821, 829 (1997) (tax immunity is "a permitted consequence" of federal instrumentality designation). That leaves open the question of whether and how Congress exercised that power. Here, of course, whether Congress could grant immunity from income taxes to the BFCs is not in dispute; Congress did so,

without protest from Missouri, until 1985. The question is whether Congress continued to do so after 1985.[2]

To answer that question, the Court should once again use the criteria articulated in *United States v. New Mexico*: that implied immunity be given only to "the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned." 455 U.S. at 735. CoBank attacks the use of that test by asserting that it applies only to "federal contractors, not federal instrumentalities." Resp. Br. at 30. Though it was certainly adopted in the context of contractors, it is not limited to that context.

The question posed in *New Mexico*, as in other contractor tax cases, was when could a privately owned, for-profit enterprise, performing services for the Government, claim the United States' constitutional tax immunity? This question is subsidiary to the larger question of when a private party may claim a tax exemption as to benefits received in the performance of activities which also serve the purposes of the United States. It is closely related to issues like the taxability of federal employees' salaries and the taxability of federal creditors. Thus, rather than being limited to contractor tax cases, the *New Mexico* test has been cited in a wide variety of non-contractor cases. *E.g., Jefferson County v. Acker*, 527 U.S. 423, 436-37 (1999) (case involving the taxation of Federal Judges' salaries; citing *New Mexico* for the proposition that this

---

[2] *Federal Land Bank v. Kiowa County*, 368 U.S. 146 (1961), upon which Cobank also relies, is of little help in answering that question. Because the Court there was construing express statutory language, it did not consider the availability of implied immunity. *Id.* at 156.

Court has reaffirmed "'a narrow approach to governmental tax immunity," and "contract[ed] the once expansive intergovernmental tax immunity doctrine"); *South Carolina v. Baker*, 485 U.S. 505, 516-527 (1988) (discussing *New Mexico* among developments in the doctrine of intergovernmental tax immunity that required overruling previous precedent granting such immunity to state bond interest paid to private parties); *Rockford Life Ins. Co. v. Illinois Dept. of Revenue*, 482 U.S. 182, 191 n.11 (1987) (case involving state taxability of federally guaranteed bonds; citing *New Mexico* for the proposition that taxability would not necessarily be improper even if such taxability was shown to affect the "federal fisc").

One such non-contractor case was *California State Bd. of Equalization v. Sierra Summit, Inc.*, where this Court considered the taxability of a bankruptcy liquidation sale. 490 U.S. 844, 845-46 (1989). The Court rejected the argument that a sales tax on the bankruptcy trustee impermissibly interfered with the federal operations of the bankruptcy court, recognizing that the argument rested on a view of intergovernmental tax immunity that the Court had rejected in cases beginning with *James v. Dravo Contracting*, 302 U.S. 134 (1937). Rather than stretch immunity to the points urged there by Sierra Summit and here by CoBank, the Court held, again, that "absolute tax immunity is appropriate only when the tax is on the United States itself, 'or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities.'" *Id.* at 848-49 (quoting *New Mexico*, 455 U.S. at 735). Applying the *New Mexico* test, the Court upheld the sales tax because it was nondiscriminatory, and because the bankruptcy trustee was not so closely connected to the Government that the two could not realistically be viewed as separate entities. *Id.* at 849-50.

Whether CoBank, a privately owned corporation that operates for the profit of its private shareholders, falls within the absolute constitutional immunity from taxation now reserved to the United States itself, is well within the realm of questions the *New Mexico* test was designed to answer.[3] By contrast, that test does not answer other questions regarding intergovernmental tax immunity. In particular, this Court expressly excluded discriminatory taxes from the approach it took in *New Mexico*. Thus "state taxes on contractors are constitutionally invalid if they discriminate against the Federal Government, or substantially interfere with its activities," regardless of whether the entity being taxed is entitled to implied immunity. 455 U.S. at 735 n.11. Similarly, the fact that federal employees are not protected from nondiscriminatory state taxes does not deprive them of the protection from discriminatory taxes that *M'Culloch* established. *See e.g, Jefferson County v. Acker*, 527 U.S. at 436-37; *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 811 (1989).

---

[3] Because it rejects the use of the *New Mexico* test, CoBank does not explain how it would apply to the Rural Telephone Bank, CoBank's "apt illustration" of a federal instrumentality with implied immunity. Resp. Br. at 28. The Bank is "an agency of the United States," subject to the supervision and direction of the Secretary of Agriculture, able to use the facilities and services of employees of the Secretary without cost, and subject to the Federal Tort Claims Act and to supervision of certain litigation by the Attorney General. 7 U.S.C. § 943 (a), (b), and (e). Because of ties to the government that the BFCs do not have, the Bank could plausibly be said to be "so closely connected to the Government that the two cannot realistically be viewed as separate entities" (*New Mexico*, 455 U.S. at 735).

By failing to distinguish between the issue here and that raised by claims of discriminatory taxes, CoBank not only reads *New Mexico* and its successors too narrowly, but also misinterprets this Court's holding in *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392 (1983). Noting that the Court in *Memphis Bank* called 31 U.S.C. § 742 a codification of the constitutional rule, CoBank presents the "relevant part" of that statute, which provides that federal obligations are exempt from state tax unless otherwise provided for by law. Resp. Br. at 25. CoBank neglects to mention that § 742 statutorily defines the scope of immunity; it does not invoke or rely on implied immunity alone. And CoBank fails to acknowledge that the "constitutional rule" the Court applied was that "[w]here, as here, the economic but not the legal incidence of the tax falls on the Federal Government, such a tax generally does not violate the constitutional immunity if it does not discriminate against holders of federal property or those with whom the Federal Government deals." 459 U.S. at 397.

The Court in *Memphis Bank* made clear that the scope of the protection from discriminatory taxes is wider than the protection from nondiscriminatory taxes: "Although the scope of the Federal Government's constitutional tax immunity has been interpreted more narrowly in recent years, there has been no departure from the principle that state taxes are constitutionally invalid if they discriminate against the Government. *See, e.g., United States v. New Mexico.*" 459 U.S. at 397 n.7. Thus, the reason the Tennessee tax was invalidated was not solely, as CoBank implies, because it was a tax on the holders of Federal Credit Bank bonds, but rather because it violated the ban on discriminatory taxes that is "at the heart of modern intergovernmental tax immunity case law." *South Carolina v. Baker*, 485 U.S. at 525-26. Because CoBank never claims that Missouri's corporate income tax is

discriminatory, it cannot rely on that ban, nor on this Court's decision not to use the *New Mexico* test to define its reach.

2. Congress, by merely authorizing temporary, indirect federal financial assistance, did not confer broad tax immunity.

The BFCs, because they are designated governmental instrumentalities that perform functions that benefit the government, are entitled to "enjoy the benefits and immunities conferred by explicit statutes." *Arkansas v. Farm Cred. Servs.*, 520 U.S. at 829. But in claiming that BFCs are immune from state income taxes, CoBank cannot point to any "explicit statute." Thus it picks and chooses from the legislative history of the 1985 Amendments to justify its theory that Congress restored – or even expanded[4] – the BFCs' broad tax immunity without saying a word.

---

[4] The Director pointed out that CoBank's rationale would preclude the imposition even of property taxes. In its brief, CoBank denies that premise, arguing that implied immunity never applied to property taxes, and citing *M'Culloch*. Resp. Br. at 36. That argument ignores post-*M'Culloch* holdings. *E.g. Rohr Aircraft Corp. v. County of San Diego*, 362 U.S. 628, 634 (1960) ("[T]he general rule is 'that lands owned by the United States of America or its instrumentalities are immune from state and local taxation.'"); *United States v. County of Fresno*, 429 U.S. 452 (1977). It fails to articulate a rationale for a line between real property and all other taxes. And it fails to explain why Congress has so consistently addressed the property tax question when it more specifically defines the nature of a financial institution's immunity. Pet. Br. at 25-26.

CoBank begins with the impetus for the 1985 Amendments: a crisis in American agriculture. But then it ignores the response to that crisis: the restructuring of the Farm Credit System to make it more independent and self-sufficient. CoBank stresses the "new federal assistance" authorized by the 1985 Amendments, but disregards that this assistance would be available only as a last resort, after the Farm Credit Administration certified that it had made the maximum practicable efforts on its own to deal with its financial stress. Even then, the Secretary of Treasury would have discretion as to whether the federal government would backstop the System's finances. And the assistance, if provided, was to go not to the BFCs, but to a separate temporary entity, the Farm Credit System Capital Corporation.[5]

---

[5] Indeed, "[t]he Committee rejected the idea of a direct, mandated infusion of Federal funds into the Farm Credit System. This idea was rejected for a variety of reasons including the testimony from the U.S. Department of the Treasury that if the System uses its own resources effectively, outside assistance is not now needed and not likely to be needed through 1987, even though by 1988 the System's capital will be substantially reduced." H.R. Rep. No. 425, 99th Cong., 1st Sess. 14 (1985), *reprinted in* 1985 U.S.C.C.A.N. 2587, 2600-01. Both the Undersecretary of Agriculture and the Assistant Secretary of the Treasury testified before the Committee; both emphasized that the Farm Credit System was not in need of federal financial assistance. *Id.* at 35, 1985 U.S.C.C.A.N. at 2621. The $ 4 billion of federal funds to which CoBank repeatedly refers were part of the Agricultural Credit Act of 1987, appropriated two years after the 1985 Amendments and in conjunction with another restructuring of the Farm Credit System. *See* H.R. Rep. No. 295, 100th Cong., 1st Sess., *reprinted in* 1987 U.S.C.C.A.N. 2723.

CoBank is unable, of course, to point to legislative history tying this change to the amendment of Section 2134. CoBank argues that Congress's silence on BFC taxation is not surprising for two reasons. First, because Congress by eliminating the states' ability to tax the BFCs did not make an important change in the law. States were not authorized to tax BFCs during periods of federal investment prior to the 1985 Amendments, CoBank says, and the change in Section 2134 simply "conformed" the statute to "the fact of new federal investment." Resp. Br. at 36. But prior to the 1985 Amendments, a BFC was immune from state and local taxes (except real property taxes) only while the Governor of the Farm Credit Administration owned its stock. After the 1985 Amendments, according to CoBank, all BFCs are always immune because of the mere possibility that the Secretary of the Treasury may authorize, as a last resort, discretionary financial assistance to the Farm Credit System through a temporary[6] corporation separate and apart from BFCs. The differences between the original capitalization and ownership of the BFCs and the post-1985 status of the Farm Credit System are too great to support CoBank's argument.

CoBank also claims that, given the time constraints in passing the 1985 Amendments, "it is not surprising that Congress did not provide a specific explanation of the amendment to Section 2134." Resp. Br. at 37. But Congress did provide an explanation, just not CoBank's explanation. CoBank itself invokes the legislative history that contains that

---

[6] The 1985 Amendments included a section that terminated, on December 31, 1990, the Capital Corporation's authority to take on new liabilities. The House Committee believed that "five years should be adequate to see the System through its difficult period." H.R. Rep. No. 425 at 14, 1985 U.S.C.C.A.N. at 2600.

explanation, claiming that because of "new federal assistance," it makes sense that Congress labeled the change to Section 2134 as a "technical and conforming amendment." Resp. Br. at 37. This claim ignores the full explanation for the change included in the House Committee Report. That Report explained the change as "technical and conforming" because it resulted from "the elimination of the authority [of the Farm Credit Administration] to make separate investments in individual institutions" and the deletion of "references to the Governor of the Farm Credit Administration . . . since such office . . . will no longer exist." H.R. Rep. No. 425 at 28-29, 1985 U.S.C.C.A.N. at 2615. The sentences deleted from Section 2134 referred to an exemption that applied when the Governor of the Farm Credit Administration held stock in BFCs – much as the government once held shares in the Second Bank of the United States. *See First Agricultural Nat'l Bank of Berkshire Cty. v. State Tax Comm'n*, 392 U.S. 339, 355 (1968) (Marshall, J., dissenting). As to BFCs, that power, long dormant, was eliminated by the 1985 amendment.

CONCLUSION

Petitioner respectfully requests this Court to reverse the judgment of the Missouri Supreme Court and to render judgment for Petitioner.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

JAMES R. LAYTON*
State Solicitor
GAIL VASTERLING
DAVID LIEBER
Assistant Attorneys General
P. O. Box 899
Jefferson City, Missouri 65102
(573) 751-3321

Counsel for Petitioner

**Counsel of Record*
November 2000

Supreme Court, U.S.
FILED
AUG 24 2000
CLERK

(5)

No. 99-1792

In the Supreme Court of the United States

DIRECTOR OF REVENUE OF MISSOURI, PETITIONER

v.

COBANK ACB, AS SUCCESSOR TO THE NATIONAL BANK FOR COOPERATIVES

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

SETH P. WAXMAN
Solicitor General
Counsel of Record
PAULA M. JUNGHANS
Acting Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
DAVID C. FREDERICK
Assistant to the Solicitor General
DAVID ENGLISH CARMACK
DONALD B. TOBIN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

BEST AVAILABLE COPY

28PT

QUESTION PRESENTED

Whether the State of Missouri, consistently with 12 U.S.C. 2134, may tax the income of the National Bank for Cooperatives, a federally chartered instrumentality.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	11
Argument:	
State taxation of the income of banks for cooperatives is permissible under the Farm Credit Act	12
A. By its plain terms, Section 2134 confers only a narrowly defined tax exemption inapplicable here rather than a broad exemption from state income taxes for banks for cooperatives	12
B. The overall context and history of the Farm Credit Act also negate the claim of immunity in this case	16
C. The court need not decide in this case the scope of a federal instrumentality's exemption from state taxes in other contexts	20
Conclusion	22

TABLE OF AUTHORITIES

Cases:

Cotton Petroleum Corp. v. *New Mexico*, 490 U.S. 163 (1989)	12
Department of Employment v. *United States*, 385 U.S. 355 (1966)	12, 20, 21
Dunn v. *Commodity Futures Trading Comm'n*, 519 U.S. 465 (1997)	14
Edmonds v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1979)	15
Farm Credit Servs. of Cent. Ark. v. *Arkansas*, 76 F.3d 961 (8th Cir. 1996), rev'd on other grounds, 520 U.S. 821 (1997)	10, 19

Cases—Continued: Page

Farm Credit Servs. of Mid-Am. v. *Department of State Revenue*, 705 N.E.2d 1089 (Ind. Tax Ct. 1999) 10
First Agric. Nat'l Bank v. *State Tax Comm'n*, 392 U.S. 339 (1968) 21, 22
Gustafson v. *Alloyd Co.*, 513 U.S. 561 (1995) 14
M'Culloch v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819) 12, 20
Northwest La. Product Credit Ass'n v. *State*, 746 So. 2d 280 (La. Ct. App. 1999) 10
Production Credit Ass'n of Eastern N.M. v. *Taxation & Revenue Dep't*, 999 P.2d 1031 (N.M. Ct. App.), cert. denied, 997 P.2d 820 (2000) 10
Russello v. *United States*, 464 U.S. 16 (1983) 18
South Dakota v. *Yankton Sioux Tribe*, 522 U.S. 329 (1998) 14
State v. *Farm Credit Servs. of Cent. Ark.*, 994 S.W.2d 453 (Ark. 1999), cert. denied, 120 S. Ct. 1530 (2000) 10
United States v. *Naftalin*, 441 U.S. 768 (1979) 19
United States v. *New Mexico*, 455 U.S. 720 (1982) 12
United States v. *Wong Kim Bo*, 472 F.2d 720 (5th Cir. 1972) 18

Constitution and statutes:

U.S. Const. Art. VI, Cl. 2 (Supremacy Clause) 9
Agricultural Credit Act of 1987, Pub. L. No. 100-233, 101 Stat. 1568:
§ 201, 101 Stat. 1585-1605 8
§ 401:
101 Stat. 1629 17
101 Stat. 1637 17
§ 410, 101 Stat. 1637 17
§ 413(b)(4), 101 Stat. 1639 4
§ 805(p), 101 Stat. 1716 8

Statutes—Continued: Page

Farm Credit Act of 1933, ch. 98, 48 Stat. 257 2
§ 2, 48 Stat. 257 3
§ 30, 48 Stat. 261 3
§ 33, 48 Stat. 262 ..... 3, 4
§ 34, 48 Stat. 262-263 3
§ 40, 48 Stat. 264 ..... 3, 4
§ 63, 48 Stat. 267 ..... 5, 13, 15
Farm Credit Act of 1955, ch. 785, 69 Stat. 655 4
Farm Credit Act of 1971, Pub. L. No. 92-181, 85 Stat. 583:
§ 1.15, 85 Stat. 587 17
§ 1.21, 85 Stat. 590 17
§ 2.8, 85 Stat. 597 17
§ 2.17, 85 Stat. 602 18
§ 3.13, 85 Stat. 608-609 (former 12 U.S.C. 2134 (1976)) 6, 8, 10, 13, 14
§ 4.0, 85 Stat. 609 ..... 5, 6
Farm Credit Amendments Act of 1985, Pub. L. No. 99-205, 99 Stat. 1678:
§ 101, 99 Stat. 1678 ..... 7, 8, 13
§ 103, 99 Stat. 1680-1687 ..... 8, 13
§ 201(1), 99 Stat. 1688 7
§ 201(7), 99 Stat. 1691-1693 7
§ 205, 99 Stat. 1703-1707 8
§ 205(e):
99 Stat. 1704 8
99 Stat. 1705 8
§ 205(e)(10), 99 Stat. 1705 8
§ 205(e)(16), 99 Stat. 1705 18
Federal Credit Union Act, Pub. L. No. 86-354, 73 Stat. 628, 12 U.S.C. 1751 *et seq.* 19
12 U.S.C. 1768 19
12 U.S.C. 531 19
12 U.S.C. 1430 21
12 U.S.C. 1433 21
12 U.S.C. 1451 21
12 U.S.C. 1452 21
12 U.S.C. 1717 (1994 & Supp. IV 1998) 21

12 U.S.C. 1723 21

Statutes—Continued: Page

12 U.S.C. 2002(a) 16
12 U.S.C. 2011(a) 3
12 U.S.C. 2023 ..... 16, 17
12 U.S.C. 2071(a) 3
12 U.S.C. 2071(b)(7) 3
12 U.S.C. 2077 ..... 10, 16, 18
12 U.S.C. 2077 (1982) 11
12 U.S.C. 2091(a) 3
12 U.S.C. 2091(b)(4) 3
12 U.S.C. 2098 ..... 15, 17
12 U.S.C. 2121 3
12 U.S.C. 2121 note 3, 4
12 U.S.C. 2122 3
12 U.S.C. 2124 3
12 U.S.C. 2128 3
12 U.S.C. 2129 3
12 U.S.C. 2134 ..... *passim*
12 U.S.C. 2278a-11 15
12 U.S.C. 2278b-10 15
12 U.S.C. 2283 15
12 U.S.C. 2290 21
12 U.S.C. 3012 21
12 U.S.C. 3019 21
15 U.S.C. 713a-5 21
15 U.S.C. 714 21
42 U.S.C. 2297h-3 (Supp. III 1997) 21

Miscellaneous:

Farm Credit Admin., *1994 Annual Report* 4
H.R. Rep. No. 171, 73d Cong., 1st Sess. (1933) 2
H.R. Rep. No. 593, 92d Cong., 1st Sess. (1971) 3, 4, 5
H.R. Rep. No. 425, 99th Cong., 1st Sess. (1985) 7, 8, 13, 15, 16

In the Supreme Court of the United States

No. 99-1792

DIRECTOR OF REVENUE OF MISSOURI, PETITIONER

v.

COBANK ACB, AS SUCCESSOR TO THE NATIONAL BANK FOR COOPERATIVES

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case concerns whether Congress has exempted from state taxation the income of a privately-owned, for-profit agricultural lending bank chartered as a federal instrumentality under the Farm Credit Act of 1971, 12 U.S.C. 2001 *et seq.*, as amended by the Farm Credit Amendments Act of 1985, Pub. L. No. 99-205, 99 Stat. 1678. The United States has a substantial interest in ensuring that statutorily defined federal instrumentalities are taxed by States solely in accordance with federal law. In response to this Court's invitation, the United States filed an amicus curiae brief at the petition stage (and subsequently on the merits as well) in

Arkansas v. *Farm Credit Services of Central Arkansas*, 520 U.S. 821 (1997), which presented an issue similar to the one here. The Court decided that case on procedural grounds, however, without reaching the merits.

STATEMENT

Respondent CoBank ACB is successor to all rights and obligations of the National Bank for Cooperatives. It seeks a refund of state income taxes paid to Missouri by the National Bank for Cooperatives for the years 1991 through 1994. Pet. App. A8-A9.

1. In the Farm Credit Act of 1933, ch. 98, 48 Stat. 257, Congress reformed the system of lending for farmers in a manner intended "to provide stimulus in the form of Government capital and supervision to the establishment of local institutions in which farmers are participants and owners and through which necessary credit may be provided on a safe business basis and at reasonable cost." H.R. Rep. No. 171, 73d Cong., 1st Sess. 2 (1933). The Act sought to accomplish that goal through the organization and chartering of different types of institutions that would meet the specific credit needs of farmers.

Under the overall supervision of the Farm Credit Administration, the system as enacted by Congress in 1933 organized the country geographically into 12 farm credit districts, with each district having a federal land bank, a number of federal land bank associations, a federal intermediate credit bank, a number of production credit associations, and a bank for cooperatives. Within the district, each institution had a discrete lending purpose: the federal land bank to make long-term first loans secured by mortgages on farm land to farmers through land bank associations; production

credit associations to make short- and intermediate-term loans to farmers and ranchers with capital obtained by discounting loans with the federal intermediate credit bank; and the bank for cooperatives to make loans to cooperative associations that are engaged in marketing farm products, purchasing farm supplies, or furnishing farm-business services. See generally H.R. Rep. No. 593, 92d Sess., 1st Sess. 6-9 (1971) (describing institutions in the Farm Credit System). By statute, each of those institutions is defined as an "instrumentality of the United States." See 12 U.S.C. 2121 note (national bank for cooperatives); 12 U.S.C. 2121 (banks for cooperatives); 12 U.S.C. 2071(a) and (b)(7) (production credit associations); 12 U.S.C. 2011(a) (farm credit banks); 12 U.S.C. 2091(a) and (b)(4) (federal land bank associations).

The Farm Credit Act of 1933 also established a Central Bank for Cooperatives in addition to the bank for cooperatives in each of the 12 farm credit districts. Ch. 98, §§ 2, 30, 40, 48 Stat. 257, 261, 264. Congress intended for the Central Bank for Cooperatives to make loans to cooperative associations. See § 34, 48 Stat. 262-263; 12 U.S.C. 2122, 2124, 2128, 2129. The debentures issued by the Central Bank, however, "are not guaranteed in any way by the United States." H.R. Rep. No. 593, *supra*, at 9. Rather, Congress intended the loan funds of the banks to be obtained from the capital and surplus of the banks, as well as from the sale of debentures to the investing public. *Ibid.*

Although Congress initially capitalized the banks for cooperatives (and other institutions in the Farm Credit System), see Farm Credit Act of 1933, ch. 98, §§ 33, 40, 48 Stat. 262, 264, it provided for the governmental stake in those institutions to be retired "by the creation of permanent capital provided by the users of the bank."

H.R. Rep. No. 593, *supra*, at 9. See Farm Credit Act of 1955, ch. 785, 69 Stat. 655 (providing mechanisms to facilitate retirement of government stock ownership in banks for cooperatives). "The first of the banks for cooperatives to retire all of its Government capital did so in 1965 and the last in 1968. Therefore all Government capital has now been retired, and the banks are completely owned by borrowing cooperatives." H.R. Rep. No. 593, *supra*, at 9.

In 1987, Congress authorized the merger of the Central Bank and the district banks for cooperatives. Agricultural Credit Act of 1987, Pub. L. No. 100-233, § 413(b)(4), 101 Stat. 1639 (12 U.S.C. 2121 note). Pursuant to that legislation, ten district banks and the Central Bank for Cooperatives merged and formed the National Bank for Cooperatives. J.A. A22-A23; Pet. App. A8-A9.[1] The taxation provisions relevant to this case, however, concern banks for cooperatives, for the 1987 Act authorizing consolidation of such banks with the Central Bank for Cooperatives did not affect the taxation of those institutions. See Farm Credit Act of 1933, ch. 98, §§ 33, 40, 48 Stat. 262, 264; 12 U.S.C. 2134.

2. In the Farm Credit Act of 1933, Congress specifically provided that the Central Bank for Cooperatives and banks for cooperatives "shall be deemed to be instrumentalities of the United States" and that "all

[1] Respondent CoBank ACB is an agricultural credit bank that was created when the National Bank for Cooperatives merged with two other entities, the Farm Credit Bank of Springfield and the Springfield Bank for Cooperatives. J.A. A21-A22. Although an "agricultural credit bank" is not defined by federal statute, the Farm Credit Administration has recognized such institutions as having the combined authority of a bank for cooperatives and a farm credit bank. See Farm Credit Admin., *1994 Annual Report* 2.

notes, debentures, bonds and other such obligations issued by such banks * * * shall be exempt both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority." Ch. 98, § 63, 48 Stat. 267. That Section further provided that the income of those banks "shall be exempt from all taxation" by taxing authorities "except that any real property and any tangible personal property of such banks * * * shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed." *Ibid.* Notwithstanding that broad exemption, the 1933 Act provided a limitation: "The exemption provided herein shall not apply with respect to * * * the Central Bank for Cooperatives, or any Production Credit Corporation or Bank for Cooperatives, or its property or income after the stock held in it by the United States has been retired." *Ibid.*

By 1971, when Congress amended the Farm Credit Act, all previously-organized banks for cooperatives had become privately owned, because the stock once held in them by the United States had been retired. See H.R. Rep. No. 593, *supra*, at 9. Congress provided, however, that the Governor of the Farm Credit Administration had the authority on behalf of the United States to purchase stock in banks for cooperatives "as a temporary investment in the stock of the institution to help one or several of the banks or associations to meet emergency credit needs of borrowers." Pub. L. No. 92-181, § 4.0, 85 Stat. 609. To assist in aiding agricultural lending entities during financial emergencies, Congress empowered the Governor of the Farm Credit Administration to purchase stock in the various institutions es-

tablished within the Farm Credit System, including banks for cooperatives. § 4.0, 85 Stat. 609. Furthermore, Congress retained the exemption from taxation for each bank for cooperatives that had existed prior to 1971—an exemption contingent on ownership of stock in the bank by the United States (through the Farm Credit Administration). § 3.13, 85 Stat. 608-609 (codified at 12 U.S.C. 2134). The amended statute provided:

> Each bank for cooperatives and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such bank shall be exempt, both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territorial, or local taxing authority. *Such banks, their property, their franchises, capital, reserves, surplus, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, territorial, or local taxing authority; except that interest on the obligations of such banks shall be subject only to Federal income taxation in the hands of the holder thereof pursuant to the Public Debt Act of 1941 (31 U.S.C. 742(a)) and except that any real and tangible personal property of such banks shall be subject to Federal, State, territorial, and local taxation to the same extent as similar property is taxed. The exemption provided in the preceding sentence shall apply only for any year or part thereof in which stock in the bank for cooperatives is held by the Governor of the Farm Credit Administration.*

Ibid. (emphasis added).

By 1985, a poor agricultural economy had driven the Farm Credit System into a financial crisis. See H.R. Rep. No. 425, 99th Cong., 1st Sess. 6-11 (1985). Congress considered various options, including an infusion of federal funds into the Farm Credit System, but rejected that idea in part because of its conclusion that "if the System uses its own resources effectively, outside assistance is not now needed and not likely to be needed through 1987." *Id.* at 14. Instead, Congress enacted the Farm Credit Amendments Act of 1985, Pub. L. No. 99-205, 99 Stat. 1678, to permit the Farm Credit System to use its own resources in addressing the financial needs of members. See H.R. Rep. No. 425, *supra*, at 11, 14. Among other things, the 1985 Act restructured the Farm Credit Administration so that it would be controlled by a three-member board instead of by a Governor, § 201(1), 99 Stat. 1688, and modified the role of the Farm Credit Administration within the Farm Credit System, § 201(7), 99 Stat. 1691. Congress discontinued the Farm Credit Administration's authority to own stock in a bank for cooperatives as part of an effort to "establish the Farm Credit Administration as an arms length regulator of the System institutions and to take it out of certain activities of the System which would involve it in management discretion of such institutions." H.R. Rep. No. 425, *supra*, at 28. See Pub. L. No. 99-205, §§ 101, 201(7), 99 Stat. 1678, 1691-1693; see also H.R. Rep. No. 425, *supra*, at 15 (explaining that Section 101 of the Act "would repeal and replace sections 4.0 and 4.1 of the Act, which establish two revolving funds that are available to the Governor of the Farm Credit Administration to make investments in

production credit associations, Federal intermediate credit banks, and banks for cooperatives").[2]

In addition to changes in "the basic powers, duties and authorities of the Farm Credit Administration," the Act also contained "numerous technical and conforming amendments." H.R. Rep. No. 425, *supra*, at 28; see § 205, 99 Stat. 1703-1707. Among those technical amendments was the deletion of the two sentences within Section 3.13 of the 1971 Act italicized above, which exempted a bank for cooperatives from state taxation contingent upon stock ownership by the "Governor of the Farm Credit Administration." § 205(e)(10), 99 Stat. 1705.[3] The 1985 Act left Section 3.13, now codified at 12 U.S.C. 2134, much as it currently exists (set forth at Pet. 2).[4]

---

[2] Although the Farm Credit Administration was no longer authorized to provide any separate capital assistance directly to institutions such as banks for cooperatives, it could make investments from the United States' "revolving fund" in the newly created Farm Credit System Capital Corporation. § 101, 99 Stat. 1678; H.R. Rep. No. 425, *supra*, at 28-29. The Capital Corporation became solely responsible for providing financial and technical assistance to institutions experiencing difficulties, with its funds being raised mostly internally from other institutions in the Farm Credit System. § 103, 99 Stat. 1680-1687; H.R. Rep. No. 425, *supra*, at 13-15. The Farm Credit System Assistance Board and the Farm Credit System Financial Assistance Corporation have since replaced the Farm Credit System Capital Corporation. Agricultural Credit Act of 1987, Pub. L. No. 100-233, § 201, 101 Stat. 1585-1605.

[3] Pub. L. No. 99-205 contains two separate sections designated as 205(e). The first Section 205(e) deals with production credit associations and the second deals with banks for cooperatives.

[4] In the Agricultural Credit Act of 1987, Congress amended 12 U.S.C. 2134 to add a second exception to the tax exemption, inserting after the word "authority," the clause "except that interest on

3. Respondent's predecessor, the National Bank for Cooperatives, filed Missouri corporate income tax returns and paid Missouri income tax for tax years 1991 through 1994. In March 1996, respondent filed amended returns on behalf of the National Bank for Cooperatives, seeking refunds of income tax paid for 1991 through 1994 on the ground, *inter alia*, that the National Bank for Cooperatives was exempt from state income taxation because it was a federal instrumentality and Congress had not expressly consented to its being subject to state taxation in the amended version of the Farm Credit Act (12 U.S.C. 2134). The Missouri Director of Revenue denied respondent's claims in pertinent part. J.A. A14-A20, A29-A34. Respondent challenged that decision before Missouri's Administrative Hearing Commission, which upheld the director's denial. Pet. App. A6-A16. The commission held that the National Bank for Cooperatives had not established that it was a federal instrumentality statutorily exempt from state taxation of its income. The commission determined that, in contrast to farm credit banks and federal land bank associations, Congress did not expressly provide that banks for cooperatives would have immunity from state income taxation. *Id.* at A14. The commission found that had Congress intended to confer upon banks for cooperatives the same immunity that was provided to farm credit banks and federal land bank associations, it would have done so expressly. *Ibid.* For jurisdictional reasons, the commission did not reach respondent's constitutional claim. *Id.* at A2, A11.

4. The Missouri Supreme Court upheld respondent's constitutional challenge to the tax. That court inter-

---

such obligations shall be subject to Federal income taxation in the hands of the holder." Pub. L. No. 100-233, § 805(p), 101 Stat. 1716.

preted this Court's Supremacy Clause jurisprudence to accord federal instrumentalities immunity from state income taxation and to require that such immunity could be waived only by express statutory consent. Pet. App. A2-A3. The court reasoned that Congress had consented to state income taxation of banks for cooperatives under Section 3.13 of the Farm Credit Act of 1971 (former 12 U.S.C. 2134 (1976)) after the United States no longer owned stock in those banks, but that the 1985 amendments to the 1978 Act deleted that consent. Pet. App. A3. The court further opined that Congress's consent to taxation is at most implied and thus is insufficient to constitute a waiver. *Ibid.* The Missouri Supreme Court noted that other courts that have addressed the question under the Farm Credit Act, which has virtually identical language for production credit associations, had reached the same conclusion that States could not tax the income of those Farm Credit System institutions. *Ibid.* (citing *Farm Credit Servs. of Cent. Ark.* v. *Arkansas*, 76 F.3d 961, 964 (8th Cir. 1996), rev'd on other grounds, 520 U.S. 821 (1997); *State* v. *Farm Credit Servs. of Cent. Ark.*, 994 S.W.2d 453, 456 (Ark. 1999), cert. denied, 120 S. Ct. 1530 (2000); *Farm Credit Servs. of Mid-Am.* v. *Department of State Revenue*, 705 N.E.2d 1089, 1092 (Ind. Tax Ct. 1999); *Northwest La. Prod. Credit Ass'n* v. *State*, 746 So. 2d 280 (La. Ct. App. 1999)).

The New Mexico Court of Appeals reached the opposite conclusion with respect to income taxation of production credit associations under 12 U.S.C. 2077. See *Production Credit Ass'n of Eastern N.M.* v. *Taxation & Revenue Dep't*, 999 P.2d 1031 (Ct. App.), cert. denied, 997 P.2d 820 (N.M. 2000), reprinted in Pet. App. A17-A32. That court held that, under the language and history of 12 U.S.C. 2077, Congress had consented to

state taxation of the income of production credit associations. Pet. App. A30-A32. The court reasoned that, under the 1933 and 1971 Acts, production credit associations were exempt from state income tax only for so long as the United States owned stock in those associations. The court further concluded that the repeal in 1985 of the two sentences in 12 U.S.C. 2077 (1982) conditionally exempting the production credit associations from state income tax so long as the United States owned an equity interest in the associations did not change the law, but merely reflected the fact that the sentences had become redundant because the United States no longer held or would hold shares of stock in those associations. Pet. App. A28.

SUMMARY OF ARGUMENT

The decision below erroneously construed the Farm Credit Act of 1971, 12 U.S.C. 2134, to exempt banks for cooperatives from state income taxes. The Farm Credit Act of 1933 conferred on banks for cooperatives a broad exemption from such state taxation, but only for so long as the federal government maintained stock holdings in them. Since 1968, the federal government has not held any stock in a bank for cooperatives. Since that time, therefore, such banks have enjoyed a limited express exemption from state taxation with respect to their obligations, but the banks themselves have been liable for income taxation such as the State seeks to impose here.

In 1985, Congress enacted technical amendments that deleted the broader exemption from tax that had applied when the United States owned stock in banks for cooperatives. In ruling that Congress evinced no intent to continue to subject banks for cooperatives to state income taxation, the state supreme court in effect

interpreted the 1985 technical amendments as if Congress had deleted the condition precedent to the broad exemption—the federal government's stock ownership—but had not deleted the exemption itself. Neither the language of the amendment nor the history of Section 2134 supports that result.

ARGUMENT

STATE TAXATION OF THE INCOME OF BANKS FOR COOPERATIVES IS PERMISSIBLE UNDER THE FARM CREDIT ACT

As this Court has made clear, while "absent express congressional authorization[ ] a State cannot tax the United States directly," *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 175 (1989) (citing *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819)), Congress determines whether, and to what extent, instrumentalities performing federal functions are exempt from state and local taxation. *United States* v. *New Mexico*, 455 U.S. 720, 733-735, 737-738, 743-744 (1982); *Department of Employment* v. *United States*, 385 U.S. 355, 358 (1966). The language, structure, and history of the Farm Credit Act make clear that Congress intended for privately-owned, for-profit banks for cooperatives to be subject to the income tax Missouri seeks to impose.

A. By Its Plain Terms, Section 2134 Confers Only A Narrowly Defined Tax Exemption Inapplicable Here Rather Than A Broad Exemption From State Income Taxes For Banks For Cooperatives

1. Since the original enactment of the Farm Credit Act in 1933, Congress has declared that all banks for cooperatives are federal instrumentalities—regardless of whether the federal government owns any stock in them—and that, as such, their "notes, debentures,

bonds, and other such obligations * * * shall be exempt both as to principal and interest from all taxation" except for "surtaxes, estate, inheritance, and gift taxes." Ch. 98, § 63, 48 Stat. 267. If the federal government held an ownership interest in a bank for cooperatives, a broader exemption from state and federal taxes applied. *Ibid.*; see § 3.13, 85 Stat. 608-609. By 1968, however, the provision conferring the broader exemption from state taxation no longer had any practical effect, because the federal government no longer held any stock interest in any bank for cooperatives. See H.R. Rep. No. 425, *supra*, at 117 (noting that "the Banks for Cooperatives [were] farmer-owned by 1968"). The condition for exempting banks for cooperatives from state income tax had therefore ceased to exist.

In 1985, Congress restructured the Farm Credit System and withdrew the federal government's authority to own stock directly in banks for cooperatives. Pub. L. No. 99-205, § 101, 99 Stat. 1678; H.R. Rep. No. 425, *supra*, at 28-29. As part of that effort to make the System more self-sufficient, Congress created the Farm Credit System Capital Corporation to provide emergency investments in System entities with capital raised from within the System. Pub. L. No. 99-205, § 103, 99 Stat. 1680-1687; H.R. Rep. No. 425, *supra*, at 13-15. For the future, any federal government financial support was limited to investments in the Capital Corporation. Pub. L. No. 99-205, § 101, 99 Stat. 1678; H.R. Rep. No. 425, *supra*, at 28-29. In accordance with that restructuring, Congress also passed various technical amendments to 12 U.S.C. 2134. Those amendments deleted the reference to the federal government's stock ownership in a bank for cooperatives and the part of Section 2134 that authorized the broader exemption from federal and state taxation when the federal gov-

ernment owned stock in a bank for cooperatives. As amended, Section 2134 thus provides that notes, debentures, and other obligations issued by a bank for cooperatives are tax exempt while providing that interest on such obligations is subject to federal income tax. 12 U.S.C. 2134. As to any other tax obligations, the statute is now silent.

Respondent argues that the 1985 technical amendments rendered them exempt from state income taxes because the absence of any statement about tax liability is tantamount to a congressional intent that banks for cooperatives be completely exempt from such taxes. Such an interpretation, however, would render meaningless the provisions in Section 2134 specifically setting out tax exemptions for obligations of banks for cooperatives. Congress would not have needed to enact specific exemptions from state taxation if it had intended a rule of general exemption to apply. Rather than read the specific tax exemptions for banks for cooperatives as surplusage, the language in the statute should be given its full effect. See *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 347 (1998) ("[T]he Court avoids interpreting statutes in a way that 'renders some words altogether redundant.'") (quoting *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 574 (1995)); *Dunn* v. *Commodity Futures Trading Comm'n*, 519 U.S. 465, 472 (1997) ("legislative enactments should not be construed to render their provisions mere surplusage").[5] From its inception in 1933 to the present,

[5] Indeed, under respondent's theory, it would be free from all state taxation, including property taxes. Such a result, however, would provide banks for cooperatives with an even broader exemption than originally enacted in 1933 by Congress, when the United States held stock in such banks, for even in that circumstance the banks were subject to property taxes. See Farm Credit Act of 1933, ch. 98, § 63, 48 Stat. 267; Pub. L. No. 92-181, § 3.13, 85 Stat. 608-609. Moreover, exempting banks for cooperatives from property tax would be inconsistent with Congress's treatment of property taxes for other institutions within the Farm Credit System. See 12 U.S.C. 2278a-11 (making Assistance Board subject to real estate taxes); 12 U.S.C. 2278b-10 (same for Financial Assistance Corporation); 12 U.S.C. 2098 (same for land bank associations).

therefore, nothing in the language of Section 2134 or its precursors supports the contention that Congress intended to create an exemption from income taxes for privately-owned banks for cooperatives.

2. Nor does anything in the legislative history of Section 2134 suggest such an intent. Because the statutory language prior to 1985 was unequivocal on this point, the state supreme court's conclusion must rest on Congress's intent in enacting the 1985 amendments. Yet nothing in the legislative history of those amendments suggests that Congress intended to grant to banks for cooperatives any expanded or new immunities from taxation. Indeed, in removing prior provisions authorizing the federal government to maintain direct stock holdings in the banks for cooperatives, as well as the original provisions conferring the broader exemption from state tax when the United States holds an ownership interest in the banks for cooperatives, the legislative history specifies that Congress intended to make only "technical and conforming amendments." H.R. Rep. No. 425, *supra*, at 28. If Congress had intended to alter the status quo in the 1985 amendments and to create a broad immunity from taxation for privately-owned banks for cooperatives, it is unlikely to have done so by a "technical amendment." See *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 266-267 (1979) ("[S]ilence [in legislative

history] * * * while contemplating an important and controversial change in existing law is unlikely."). Yet the decision below in effect assumes the exact opposite: even though Congress had explicitly created an exemption from taxation only in certain specifically defined contexts, the court nonetheless held that Congress impliedly intended to establish a much broader exemption. See Pet. App. A3.

The court's assumption is particularly implausible in view of the history of Section 2134. Congress was well aware that banks for cooperatives are for-profit entities chartered by the federal government. Consequently, Congress intended in the 1985 amendments for the federal government not to subsidize the banks for cooperatives, but rather to give the Farm Credit System the tools with which to use existing capital in the System to aid those with special financial needs. See H.R. Rep. No. 425, *supra*, at 7-8, 11-12. The history behind Section 2134, therefore, does not support the state supreme court's holding that Congress implicitly conferred upon banks for cooperatives a new, broad-based exemption from federal, state, and local taxes.

B. The Overall Context And History Of The Farm Credit Act Also Negate The Claim Of Immunity In This Case

From the original enactment of the Farm Credit Act, Congress explicitly determined which federally chartered lending institutions within the Farm Credit System would be entitled to comprehensive immunity from taxation and which would not. In addition to banks for cooperatives, the Farm Credit System includes farm credit banks, federal land bank associations, and production credit associations. 12 U.S.C. 2002(a). With respect to each entity, the Farm Credit Act contains a "taxation" provision that delineates specifically the immunity from taxes enjoyed by that entity. See 12 U.S.C. 2023 (farm credit banks), 2077 (production credit associations), 2098 (federal land bank associations), 2134 (banks for cooperatives).

For farm credit banks and federal land bank associations, Congress explicitly provided the type of comprehensive immunity that the state supreme court held to be implied here for banks for cooperatives. For example, Congress explicitly granted comprehensive immunity to farm credit banks under 12 U.S.C. 2023, which provides:

> The Farm Credit Banks and the capital, reserves, and surplus thereof, and the income derived therefrom, shall be exempt from Federal, State, municipal, and local taxation, except taxes on real estate held by a Farm Credit Bank to the same extent, according to its value, as other similar property held by other persons is taxed.

The substantive language of that exemption is identical to the language for federal land bank associations in 12 U.S.C. 2098. As to both entities, the exemption language has been largely unchanged since the Farm Credit Act of 1971. See Pub. L. No. 92-181, §§ 1.21, 2.8, 85 Stat. 590, 597.[6]

---

[6] Section 1.21 of the Farm Credit Act of 1971 addressed the taxation of both federal land banks and federal land bank associations. Section 2.8 referred to the taxation of federal intermediate credit banks. Federal land banks and federal intermediate credit banks were merged and became "farm credit banks" under the Agricultural Credit Act of 1987, Pub. L. No. 100-233, § 410, 101 Stat. 1637. As part of the 1987 Act, the taxation statutes were redesignated as Sections 1.15 and 2.17 for farm credit banks and federal land bank associations, respectively. Pub. L. No. 100-233, § 401, 101 Stat. 1629, 1637.

By contrast, production credit associations and banks for cooperatives have been granted only the limited exemption from taxation with respect to their obligations. See 12 U.S.C. 2077, 2134. Prior to the 1985 amendments to the Farm Credit Act, production credit associations (like banks for cooperatives) also possessed a broad-based exemption from taxation that was contingent upon the United States' stock ownership. See Pub. L. No. 92-181, § 2.17, 85 Stat. 602. That contingent exemption was repealed in 1985 by the same technical amendments that applied to the banks for cooperatives. See Pub. L. No. 99-205, § 205(e)(16), 99 Stat. 1705. Congress thus "intentionally and purposely" chose to grant an expansive immunity from taxation to farm credit banks and federal land bank associations, while at the same time conferring a more limited exemption (concerning only their notes, debentures, and other obligations) with respect to production credit associations and banks for cooperatives. Had Congress wished to confer upon banks for cooperatives and production credit associations the more comprehensive exemption from taxation that it had provided to federal credit banks and federal land bank associations, it presumably would have done so expressly as it had elsewhere in the Farm Credit Act. See, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting *United States* v. *Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). Congress, however, did not "write the

statute that way." *Id.* at 23 (quoting *United States* v. *Naftalin*, 441 U.S. 768, 773 (1979)).[7]

The effect of the state supreme court's decision is to grant to respondents a tax exemption equal to or potentially greater than that which Congress explicitly provided to farm credit banks and federal land bank associations, since the logic of the court's decision would arguably grant banks for cooperatives an exemption from real property taxes, an exemption not shared by either farm credit banks or federal land bank associations. See *Farm Credit Servs. of Cent. Ark.* v. *Arkansas*, 76 F.3d 961, 967 (8th Cir. 1996) (Loken, J., dissenting), rev'd on other grounds, 520 U.S. 821 (1997). That result would alter significantly the extent to which States and localities have been empowered to tax banks for cooperatives since at least 1968—an empowerment that has resulted in millions of dollars in tax revenues. See Ohio et al. Amici Cert. Br. 8. Nothing in Section 2134, the Farm Credit Act as a whole, or the pertinent legislative history indicates that Congress

---

[7] Congress also has demonstrated its ability to provide federal instrumentalities with broad exemptions from state taxation outside of the Farm Credit Act. For example, in the Federal Credit Union Act, Pub. L. No. 86-354, 73 Stat. 628 (12 U.S.C. 1751 *et seq.*), federal credit unions, their property, their funds, and their income are exempt from all federal, state or local taxation, except that, like farm credit banks, their real and personal property are subject to taxation "to the same extent as other similar property is taxed." 12 U.S.C. 1768. Federal reserve banks have been granted similarly expansive tax exemptions as well. 12 U.S.C. 531. Those statutes further point up the contextual incongruity in the state supreme court's holding here and in respondents' arguments in support of it—namely, that Congress *sub silentio* granted banks for cooperatives a comprehensive exemption from all federal, state, and local taxation.

meant for its 1985 "technical" amendments to effect such a sweeping change.

C. The Court Need Not Decide In This Case The Scope Of A Federal Instrumentality's Exemption From State Taxes In Other Contexts

The theory advanced by respondent, and accepted by the court below, is that Congress's use of the term "instrumentalit[y] of the United States" in 12 U.S.C. 2134, coupled with the deletion in 1985 of the provision conferring an exemption from tax when the United States held shares in banks for cooperatives, is sufficient to warrant application of a broad constitutional rule that a federal instrumentality may not be taxed absent express consent by Congress. See Pet. App. A2-A3 (citing *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 436-437 (1819)).

Respondent's position would require this Court to define what qualities of a federal instrumentality are sufficient to warrant recognition of such a broad-based immunity from state taxation. Yet, as this Court has noted, "there is no simple test for ascertaining whether an institution is so closely related to governmental activity as to become a tax-immune instrumentality." *Department of Employment* v. *United States*, 385 U.S. 355, 358-359 (1966). Unlike the Red Cross in that case, for instance, the banks for cooperatives do not have officers "appointed by the President," "the right and the obligation to meet this Nation's commitments under various [statutes], [or the authority] to perform a wide variety of functions indispensable to the workings of our [government]." *Id.* at 359. The banks for cooperatives do not "receive substantial material assistance from the Federal Government" nor have "the President and the Congress * * * recognized and acted in

reliance upon the [banks for cooperatives'] status virtually as an arm of the Government." *Id.* at 359-360. While *Department of Employment* noted that the foregoing qualities were not exhaustive, the Court elsewhere has expressed reluctance to announce a constitutional rule in contexts in which Congress has manifested its intent through statutory law. See, *e.g.*, *First Agric. Nat'l Bank* v. *State Tax Comm'n*, 392 U.S. 339, 341 (1968) ("Because of pertinent congressional legislation in the banking field, we find it unnecessary to reach the constitutional question of whether today national banks should be considered nontaxable as federal instrumentalities.").

That doctrine of prudence is especially appropriate in this area of the law. Congress has used the term "instrumentality" in literally scores of enactments, some with express tax exemption provisions and some without.[8] Congress also has established or chartered by statute "government corporations" and "government controlled corporations," which perform important functions and for which exemptions from certain forms of taxation may or may not be conferred by statute.[9] Because a ruling in favor of respondent could

---

[8] See, *e.g.*, 12 U.S.C. 2283, 2290 (Federal Financing Bank an "instrumentality of the United States" with specified exemptions from tax); 15 U.S.C. 713a-5, 714 (same for Commodity Credit Corporation); see also 42 U.S.C. 2297h-3 (Supp. III 1997) (provisions for United States Enrichment Corporation to be "instrumentality" with certain exemptions from taxation prior to its privatization).

[9] See, *e.g.*, 12 U.S.C. 1430, 1433 (Federal Home Loan Banks with specified exemptions from taxation); 12 U.S.C. 1451, 1452 (same for Federal Home Loan Mortgage Corporation); 12 U.S.C. 1717 (1994 & Supp. IV 1998), 12 U.S.C. 1723 (same for Government National Mortgage Association and Federal National Mortgage

bear on how the taxation of those entities is treated, conferral of any broad exemption from taxation for banks for cooperatives properly should be prescribed by Congress, if it regards such a policy to be in the national interest. See, *e.g.*, *First Agric. Nat'l Bank*, 392 U.S. at 346 ("Because of [the statute] and its legislative history, we are convinced that if a change is to be made in state taxation of national banks, it must come from Congress, which has established the present limits.").

CONCLUSION

The judgment of the Supreme Court of Missouri should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
PAULA M. JUNGHANS
Acting Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
DAVID C. FREDERICK
Assistant to the Solicitor General
DAVID ENGLISH CARMACK
DONALD B. TOBIN
Attorneys

AUGUST 2000

Association); 12 U.S.C. 3012, 3019 (same for National Consumer Cooperative Bank).

Supreme Court, U.S.
FILED
AUG 23 2000
CLERK

No. 99-1792

IN THE
SUPREME COURT OF THE UNITED STATES

DIRECTOR OF REVENUE,
Petitioner,

v.

COBANK ACB, AS SUCCESSOR TO THE
NATIONAL BANK FOR COOPERATIVES,
Respondent.

On Writ of Certiorari to the Supreme Court of Missouri

BRIEF OF *AMICUS CURIAE* MULTISTATE TAX COMMISSION IN SUPPORT OF PETITIONER

Paull Mines, General Counsel
Frank D. Katz, Dep. Gen. Counsel*
*Counsel of Record
Multistate Tax Commission
444 No. Capitol St., NW #425
Washington, DC 20001-1538
[202) 624-8699

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

1. CONGRESS HAS ALWAYS INTENDED THAT THESE FARM CREDIT BANKS BE SUBJECT TO STATE INCOME TAX WHEN PRIVATELY OWNED 6

2. COURT PRECEDENT DOES NOT SUPPORT ALL-ENCOMPASSING STATE TAX EXEMPTION FOR FEDERAL INSTRUMENTALITIES; STATE TAX EXEMPTIONS ULTIMATELY REST ON INTENT OF CONGRESS 8

A. Respondent Is Not The Kind of Federal Instrumentality That Triggers Immunity 9

B. *McCulloch* Implied Immunity Is Superceded When Congress Has Acted 11

C. No Special Words of Explicit Affirmative Authorization to Tax Are Required 14

CONCLUSION 21

TABLE OF AUTHORITIES

Page

Cases:

Arkansas v. *Farm Credit Services of Central Arkansas*, 520 U.S. 821 (1997)..... 10, 13

Austin v. *Aldermen of Boston*, 74 U.S. 694 (1869)..... 16

Baker Prod. Credit Ass'n v. *State Tax Comm'n*, 421 P.2d 984 (Or. 1966, *en banc*) 6

Columbus Prod. Credit Ass'n v. *Bowers*, 180 N.E.2d 1, *cert. denied*, 371 U.S. 826 (1962)..... 7

Complete Auto Transit, Inc. v. *Brady*, 430 U.S. 274 (1977) 14

Davis v. *Elmira Savings Bank*, 161 U.S. 275 (1896) 16

Des Moines Nat. Bank v. *Fairweather*, 263 U.S. 103 (1923) 18

Farm Credit Services of Central Arkansas v. *State of Arkansas*, 76 F.3d 961 (8th Cir. 1996) 20

Federal Land Bank v. *Crosland*, 261 U.S. 374 (1923) 18

First Agricultural Nat. Bank v. *State Tax Comm'n*, 392 U.S. 339 (1968) 13, 16

Garcia v. San Antionio Metro. Transit Auth., 469 U.S. 528 (1985) 12

TABLE OF AUTHORITIES – Continued

Page

Graves v. New York, 306 U.S. 466 (1939)..... 12

Hanna v. *Federal Land Bank Ass'n of Southern Illinois*, 903 F.2d 1159 (7th Cir. 1990)..... 10

James v. Dravo Contracting Co., 302 U.S. 134 (1937) 12

Lebron v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995) 5, 9

McCulloch v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819) 5, 6, 8, 9, 10, 11, 12, 19, 21

Merrion v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982)..... 14

Montana Livestock Prod. Credit Ass'n v. *State*, 393 P.2d 50 (Mont. 1964)..... 7

Pennsylvania Dept. of Public Welfare v. *Davenport*, 459 U.S. 552 (1990)..... 7

Osborn v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824)..... 11

Owensboro Nat. Bank v. *City Of Owensboro*, 173 U.S. 664 (1899) 17, 18

Pittman v. *Home Owners' Loan Corp. of Washington, D.C.*, 308 U.S. 21 (1939)..... 19, 20

Platt v. *Union Pacific RR Co.*, 99 U.S. 48 (1878)..... 8

TABLE OF AUTHORITIES – Continued

Page

United States v. *Allegheny County*, 322 U.S. 174 (1944) 19

United States v. *Morrison*, 129 S.Ct. 1740 (2000).. 12

United States Steel Corp. v. *Multistate Tax Comm'n*, 434 U.S. 452 (1978) 2

Wardair Canada v. *Florida Dept. Of Revenue*, 477 U.S. 1 (1986) 14

Woodland Prod. Credit Ass'n v. *Franchise Tax Bd.*, 37 Cal. Rptr. 231 (Ct. App. 1964) 7

Statutory Material:

7 U.S.C. § 941(c) 12

7 U.S.C. § 1511 12

12 U.S.C. § 548 16

12 U.S.C. § 627 12

12 U.S.C. § 1433 12

12 U.S.C. § 1441(E)(7) 12

12 U.S.C. § 1441b(f)(7) 12

12 U.S.C. § 1452(e) 12

12 U.S.C. § 1464(h) 13

TABLE OF AUTHORITIES - Continued

Page

12 U.S.C. § 1723(c) 13

12 U.S.C. § 1768 13

12 U.S.C. § 1825(a) 13

12 U.S.C. § 2098 13

12 U.S.C. § 2134 ..... 4, 6, 8

12 U.S.C. § 2290 13

16 U.S.C. § 831l 13

20 U.S.C. § 1087-2(b)(2) 13

22 U.S.C. § 2199(J) 13

42 U.S.C. § 2996b(c) 13

Farm Credit Act of 1933 15

Farm Credit Act of 1971 ..... 4, 5, 15

Farm Credit Amendments Act of 1985 ..... 5, 7

Hearings on H.R. 11798 and Companion Bills Before Special Subcomm. on State Taxation of Interstate Commerce of the House Comm. On the Judiciary, 89th Cong., 2d Sess. (1966) 2

Multistate Tax Compact 1, 2

PUB.L. No. 73-75, § 63, 48 STAT. 267 (1933) 6

TABLE OF AUTHORITIES - Continued

Page

PUB. L. NO. 86-272, 73 STAT. 555 (1959) 2

PUB.L. No. 92-181, § 3.13, 85 STAT. 608 (1971) 6

Books/Articles:

D.Brunori, *Interview: Gene Corrigan, a 'Proud Parent' of the MTC*, STATE TAX NOTES, Nov. 15, 1999 2

GARRY WILLS, A NECESSARY EVIL (1999) 11

No. 99-1792

IN THE

SUPREME COURT OF THE UNITED STATES

DIRECTOR OF REVENUE,
Petitioner,

v.

COBANK ACB, AS SUCCESSOR TO THE NATIONAL BANK FOR COOPERATIVES,
Respondent.

On Writ of Certiorari to the Supreme Court of Missouri

Brief of *Amicus Curiae* Multistate Tax Commission In Support of Petitioner

The Multistate Tax Commission ("MTC") submits this brief as *amicus curiae* in support of the Petitioner in accordance with the provisions of Rule 37.3 of the Supreme Court Rules.[1]

INTEREST OF AMICUS CURIAE

The MTC is the administrative agency created by the Multistate Tax Compact ("COMPACT"). *See* RIA ALL STATES TAX GUIDE ¶ 701 *et seq.*, p. 751 (1995). Twenty-one States have legislatively established full

[1]No counsel for any party authored this brief in whole or in part. Only *Amicus* MTC and its members States made any monetary contribution to the preparation or submission of this brief. Consent of all parties to the filing of this brief is filed herewith.

membership in the COMPACT. In addition, two States are sovereignty members and nineteen States are associate members.[2] This Court upheld the validity of the COMPACT in *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452 (1978).

The COMPACT evolved out of concern of the States and multistate taxpayers about proposed federal legislation to regulate state tax systems following the findings and recommendations of the Willis Committee.[3] *See* D. Brunori, *Interview: Gene Corrigan, a 'Proud Parent' of the MTC*, STATE TAX NOTES, Nov. 15, 1999, at 219. Specifically, the COMPACT aspired to achieve better order in state tax systems as applied to multijurisdictional commerce. In responding to the intense criticisms of state taxation of interstate commerce, the COMPACT sought to avoid congressional regulation and preemption by federal

---

[2] Compact Members: Alabama, Alaska, Arkansas, California, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Maine, Michigan, Minnesota, Missouri, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah and Washington. Sovereignty Members: Florida and Wyoming. Associate Members: Arizona, Connecticut, Georgia, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Wisconsin, and West Virginia.

[3] The Willis Committee, a congressional study of state taxation mandated by TITLE II OF PUB. L. NO. 86-272, 73 STAT. 555, 556 (1959), made extensive recommendations as to how Congress could regulate state taxation of interstate and foreign commerce. *See generally Interstate Taxation Act: Hearings on H.R. 11798 and Companion Bills Before Special Subcomm. on State Taxation of Interstate Commerce of the House Comm. on the Judiciary*, 89th Cong., 2d Sess. (1966).

elected representatives who did not have any political stake in maintaining state revenues to support essential state services.

The issue presented here is of great concern to the MTC. This case seeks a methodology for discerning possible tax exemptions arising from actions or omissions of Congress that balance enumerated congressional powers with state tax sovereignty, a reserved right necessary to the effective functioning of the States within our federal union. While Congress has authority to regulate and preempt state taxation in several circumstances, the MTC seeks clear statements in those matters affecting the sensitive balance between the Federal Government and the States. The MTC works to resolve ambiguities over tax obligations flowing from statements by Congress or other federal institutions of competent authority. Such ambiguities have the potential to undermine state taxation. In this instance, uncertainty has enabled a specialized privately-owned financial institution to seek a unique tax advantage over other financial institutions with which it competes. The adversely affected competitors inevitably and accurately view the unique treatment as unfair, resulting in greater frustration with state tax systems in general.

The MTC's interest here is particularly acute because Respondent argues that the National Bank for Cooperatives ("NBC") was imbued with an absolute state tax exemption based on implied immunity in the face of a history of contraindications in long-standing congressional legislation. The exemption appears to have no policy basis. Respondent's automatous analysis ignores the Court's long-established recognition that the political process op-

erates within our federal system as a vital element in preserving the Union. The analysis also undeservedly denigrates the willingness of Congress to discharge its institutional responsibility to express its true intent with regard to state tax immunity of bodies associated with the Federal Government in one or more aspects.

SUMMARY OF ARGUMENT

1. The question on which the Court granted certiorari is whether 12 U.S.C. § 2134 authorizes Missouri to tax Respondent's income. Under customary canons of statutory construction, the statute's express exemption of certain items from tax—notes, debentures, bonds, and other obligations of the NBC—necessarily shows that Congress intended to permit other state taxes imposed on these entities. *Expressio unius est exclusio alterius.*

The statutory history of these tax exemptions confirms Congress' intention to permit other taxes. From the first establishment of the banks for cooperatives (predecessors of the NBC) Congress prescribed precisely how they were to be treated for tax purposes. Notes, debentures, and bonds were, and still are, exempted from state tax. A second, broader exemption covered the banks, their property, and their income, but only so long as the Federal Government retained any ownership interest. After the anticipated federal divestiture, the broader exemption was rendered inoperative by a statutory exception. By 1968, divestiture was complete, the broad statutory exemption nullified, and state income taxation upheld. Congress approved this result, as it carried these provisions forward into the Farm Credit Act of 1971.

The legislative history of the Farm Credit Amendments Act of 1985, PUB. L. 99-205, 99 STAT. 1678, also confirms Congress' intent to continue unchanged the tax status of Respondent. Congress removed both the broad statutory exemption and the nullifying exception because functionally they had become self-canceling surplusage. The other changes made to the Act, as well as the legislative history describing the removal of the tax provisions as technical and conforming amendment, made absolutely clear that Congress did not intend any substantive change in how these farm credit entities were to be treated for state tax purpose. Indeed, Respondent continued paying tax through 1994.

2. The Court below held that (a) Respondent's status as a federal instrumentality combined with (b) the absence of explicit affirmative authorization to tax after the repeal of the exemption and the exception (c) resurrected the implied constitutional immunity of *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819). All three aspects of the holding are suspect.

First, the NBC is not the kind of federal instrumentality that invokes the implied constitutional immunity of *McCulloch*. It would not be considered a federal instrumentality were it not so labeled. Congressional labeling of a federal entity no longer necessarily controls its status for all purposes. *Lebron* v. *National Railroad Passenger Corporation*, 513 U.S. 374 (1995).

Second, the implied immunity of *McCulloch* is superceded when Congress specifies the extent of immunity it intends for the federal entities it creates. The immunity is implied only to protect federal

entities when Congress is silent. When Congress acts to provide the immunity it believes necessary, continuing the implied immunity leads to precisely the unintended and incorrect results embodied in the decision below.

Finally, no special phraseology of explicit affirmative authorization for States to tax is required. This Court's decisions on state taxation of federal instrumentalities show that the normal application of the tools of statutory construction dictates the interpretation of 12 U.S.C § 2134.

ARGUMENT

1. CONGRESS HAS ALWAYS INTENDED THAT THESE FARM CREDIT BANKS BE SUBJECT TO STATE INCOME TAX WHEN PRIVATELY OWNED.

From their first creation in 1933, the NBC's predecessor banks for cooperatives were exempt *by statute* from state income taxes, but only so long as they had federal ownership. Congress effected this result through a broad statutory exemption for the banks, their property, and their income, followed by a statutory exception limiting the exemption to those years when the Federal Government held stock in the bank. PUB. L. No. 73-75, § 63, 48 STAT. at 267 (1933); PUB. L. No. 92-181, § 3.13, 85 STAT. at 608 (1971). By the 1960s the Federal Government had fully divested itself of all ownership interest in the farm credit entities. The exception had swallowed the exemption, rendering it inoperative. Courts uniformly upheld state taxation of these privately owned farm credit banks. *See Baker Prod. Credit Ass'n* v. *State Tax Comm'n*, 421 P.2d 984, 985

(Or. 1966, *en banc*); *Woodland Prod. Credit Ass'n* v. *Franchise Tax Bd.*, 37 Cal. Rptr. 231, 233 (Ct. App. 1964); *Montana Livestock Prod. Credit Ass'n* v. *State*, 393 P.2d 50, 53 (Mont. 1964); *Columbus Prod. Credit Ass'n* v. *Bowers*, 180 N.E.2d 1, *cert. denied*, 371 U.S. 826 (1962).

In the Farm Credit Amendments Act of 1985 Congress deleted the exemption along with the nullifying exception as surplusage in Section 205 styled technical and conforming amendments. By repealing the self-canceling exemption and exception, Congress intended no change in the authority of States to tax these farm credit banks. That intent is shown by several factors. First, a simple examination of the language of the two repealed sentences reveals that they no longer accomplished anything and could be omitted without substantive effect. Second, there is no basis textually and no legislative history that so much as hints at any intended tax change. Third, if Congress did intend a complete about-face—suddenly exempting these privately-owned entities from state tax—it surely makes no sense to do so by the subtle indirection of resurrected implied constitutional immunity rather than simply by leaving the existing, explicit statutory exemption in place and repealing only the exception. Conversely, if Congress did indeed intend to rely on the implied constitutional immunity of *McCulloch* for the first time with these entities by repealing the exemption and exception, then it makes no sense to retain the superfluous *statutory* exemption from state tax for obligations of the banks. *See Pennsylvania Dept. of Public Welfare* v. *Davenport*, 459 U.S. 552, 562 (1990) ("Our cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same

enactment."); *Platt* v. *Union Pacific RR Co.*, 99 U.S. 48, 58 (1878) ("But the admitted rules of statutory construction declare that a legislature is presumed to have used no superfluous words."). Finally, imparting broad immunity to these farm credit banks is totally inconsistent with a primary purpose of these 1985 amendments to the farm credit system to make the privately owned banks even more independent of federal government management.

Congress has specified in 12 U.S.C. § 2134 the degree of immunity it thinks appropriate by providing an exemption only for the notes, debentures, bonds, and other obligations of the NBC. From the language of the statute, from the interpretive principle of *expressio unius est exclusio alterius*, and from the history of the legislation and the legislative history, it is thoroughly clear that Congress intended to limit the exemption from state tax to that currently expressed in 12 U.S.C. § 2134. Section 2134 thus authorizes Missouri's income tax.

2. COURT PRECEDENT DOES NOT SUPPORT ALL-ENCOMPASSING STATE TAX EXEMPTION FOR FEDERAL INSTRUMENTALITIES; STATE TAX EXEMPTIONS ULTIMATELY REST ON INTENT OF CONGRESS.

The decision below relies on the theory that (a) Respondent's status as a federal instrumentality combined with (b) the absence of explicit affirmative authorization to tax after the 1985 repeal of the exemption and exception (c) resurrected the implied constitutional immunity from state tax derived from *McCulloch*. But all three elements of that decision are unfounded.

A. Respondent Is Not The Kind of Federal Instrumentality That Triggers Immunity.

Respondent and the statutorily similar production credit associations are not the kinds of federal instrumentalities that trigger the implied immunity of *McCulloch*. The number and variety of federal agencies, instrumentalities, and corporations has grown enormously over the last 70 years. No longer is it a simple yes-or-no question to determine whether a particular government corporation is part of the Federal Government and whether it has sovereign immunity, tax immunity, or various other kinds of immunities available to the Government (*e.g.* from jury trials). Congress has created corporations like Comsat and Amtrak "specifically designed not to be agencies or establishments of the United States Government," *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374, 390 (1995), but not entirely divorced from the Government either. Just which attributes of federal identity these corporations retain has become an increasingly nuanced decision. No longer does the Court accept the label applied by Congress as controlling in all cases. *Id.* at 394 (Amtrak sufficiently connected to the Federal Government to have First Amendment responsibilities even though not a federal instrumentality).

Admittedly, these farm credit banks enjoy a formal and undoubted designation as federal instrumentalities. Nevertheless, they are crucially different from the kind of entity that this Court has found to be a federal instrumentality in the absence of such designation, particularly in light of their private ownership and commercial purpose. Indeed, this Court has already acknowledged that production

credit associations are privately owned banks that fulfill a commercial, rather than a governmental role:

> The PCA's' business is making commercial loans, and all their stock is owned by private entities. Their interests are not coterminous with those of the Government any more than most commercial interests. Despite their formal and undoubted designation as instrumentalities of the United States, and despite their entitlement to those tax immunities accorded by the explicit statutory mandate, PCA's do not have or exercise power analogous to that of the NLRB or any of the departments or regulatory agencies of the United States.

Arkansas v. *Farm Credit Services of Central Arkansas*, 520 U.S. 821, 831-32 (1997). *See also Hanna* v. *Federal Land Bank Ass'n of Southern Illinois*, 903 F.2d 1159, 1162 (7th Cir. 1990) (farm credit banks "are private employers without sufficient governmental involvement to constitute federal agencies exempt from jury trials in actions brought under the ADEA.").

The Court in *Farm Credit Services* found that the production credit association was not sufficiently connected to the Government to trigger an exemption from the Tax Injunction Act. There appears to be no basis to suggest that a lower threshold of governmental connection should trigger the implied immunity from *McCulloch*.

B. *McCulloch* Implied Immunity Is Superceded When Congress Has Acted.

Historical currents help understand the development and parameters of the implied immunity doctrine of *McCulloch v. Maryland*. That decision grew from the early battles for federalism. In those early years the nascent Federal Government was fighting for its very existence against the markedly more entrenched and established power of the States. *See, e.g.*, Jefferson's and Madison's roles in drafting the Kentucky and Virginia Resolutions. GARRY WILLS, A NECESSARY EVIL, 134-152 (1999). Failure of the central government to achieve sustainable authority had doomed the earlier Articles of Confederacy. Thus, when Chief Justice Marshall rode to the defense of the Second Bank of the United States in 1819 against the discriminatory tax imposed by the State of Maryland, he wisely emphasized the importance of protecting federal instrumentalities from the destructive power of a state tax. That crucial early defense of a viable federalism in *McCulloch* lives today as a vital cornerstone of federal authority.

In *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), the Court reaffirmed that the implied immunity from state tax needed no enactment from Congress to activate. Silence led to the presumption of immunity. Congress could, if it chose, specify the precise degree of immunity it believed appropriate for any particular federal instrumentality. *Id.* at 865-66.

In the last 175 years, the calibration of federal and state power has gradated toward ever-greater

federal hegemony. Reflecting that change, this Court substantially narrowed the intergovernmental immunity doctrine in the late 1930s. *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937); *Graves v. New York*, 306 U.S. 466 (1939). More recently, the interstate highway system and now the information superhighway have interlaced the country to such a great extent that the overwhelming preponderance of all commerce is "interstate commerce" and subject to federal control. *See United States* v. *Morrison*, 129 S.Ct. 1740, 1752-53 (2000). Power and money now flow to Washington directly, bypassing the States as less relevant on really important issues. *See Garcia v. San Antionio Metro. Transit Authority*, 469 U.S. 528, 566-67, n. 9, (1985) (Powell, J., dissenting) (discussing the current strength of the federal government over state government). Congress no longer displays any reluctance to strike the balance necessary to protect federal interests.

In legislation establishing various federal instrumentalities and corporations, Congress for some time has routinely specified to what extent such entities are exempt from state tax. Congress no longer rests tax immunity for its multitudinous federal instrumentalities on *McCulloch*'s implied immunity but rather resolves these issues in the enabling legislation. A review of legislation creating various federal entities shows the consistency with which Congress has specified in statute the desired degree of exemption from state tax.[4]

---

[4] Rural Telephone Bank, 7 U.S.C. § 941(c); Federal Crop Insurance Corporation, 7 U.S.C. § 1511; Foreign Banking Corporations, 12 U.S.C. § 627; Federal Home Loan Banks, 12 U.S.C. § 1433; Financing Corporation, 12 U.S.C. § 1441(E)(7); Resolution Funding Corporation, 12 U.S.C. § 1441b(f)(7); Federal Home Loan Mortgage Corporation, 12 U.S.C. § 1452(e); Federal Savings and Loan Associations, 12 U.S.C. § 1464(h); National Mortgage Associations, 12 U.S.C. § 1723(c); Federal Credit Unions, 12 U.S.C. § 1768; Federal Deposit Insurance Corporation, 12 U.S.C. § 1825(a); Federal Land Bank Associations, 12 U.S.C. § 2098; Federal Financing Bank, 12 U.S.C. § 2290; Tennessee Valley Authority, 16 U.S.C. § 831l; Student Loan Marketing Association, 20 U.S.C. § 1087-2(b)(2); Overseas Private Investment Corporation, 22 U.S.C. § 2199(J); Legal Services Corporation, 42 U.S.C. § 2996b(c).

This change in the balance of power in the federal-state relationship renders appropriate here a strong affirmation that where Congress has specified what immunity from tax an entity carries, Supremacy Clause-based immunity is measured by that congressional enactment, not by a constitutional presumption. Such an affirmation would be consistent with this Court's statement about production credit associations referring to "their entitlement to those tax immunities accorded by the explicit statutory mandate." *Farm Credit Services*, 520 U.S. at 832. Immunity is implied, after all, to protect federal entities. When Congress acts to impart the protection it deems necessary, implied immunity is superceded as irrelevant. *See First Agricultural Nat. Bank* v. *State Tax Comm'n*, 392 U.S. 339, 341 (1968) ("Because of pertinent congressional legislation in the banking field, we find it unnecessary to reach the constitutional question of whether today national banks should be considered nontaxable as federal instrumentalities.").

This Court employs a similar constitutionally implied protection for federal interests in the absence of legislation with its commerce clause analysis. Where Congress has not otherwise acted, the dormant commerce clause restrains States from

regulating or taxing interstate commerce in certain ways. *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977). When Congress acts, however, the dormant commerce clause itself goes dormant; the only limits on state actions are those prescribed by congressional action. *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 154 (1982):

> Once Congress acts, courts are not free to review state taxes or other regulations under the dormant Commerce Clause. When Congress has struck the balance it deems appropriate, the courts are no longer needed to prevent States from burdening commerce, and it matters not that the courts would invalidate the state tax or regulation under the Commerce Clause in the absence of congressional action.

See also Wardair Canada v. *Florida Dept. Of Revenue*, 477 U.S. 1, 9 (1986) ("the Federal Government has affirmatively acted, rather than remained silent, with respect to the power of the States to tax aviation fuel, and thus . . . the case does not call for dormant Commerce Clause analysis at all."). The question thus becomes "What has Congress done?"

C. No Special Words of Explicit Affirmative Authorization To Tax Are Required.

Respondent argues that after the 1985 repeal of the exemption and exception from 12 U.S.C. § 2134 the remaining language in this tax exemption provision became inadequate to permit the States to tax its income. The lack of express affirmative authorization for the States to tax meant that *McCulloch*'s

implied immunity became controlling. Such a conclusion distorts this Court's intergovernmental immunity jurisprudence. When Congress acts to specify the immunity appropriate for a federal instrumentality, that expression of congressional will determine the extent of immunity the instrumentality carries. This Court has never held that Congress must affirmatively express its assent to state tax in any particular formulation of language. Such assent may be derived from legislation using standard statutory interpretation methods.

Curiously, neither the Farm Credit Act of 1933 nor the Farm Credit Act of 1971 *ever* contained such an express affirmative authorization for the States to impose income tax. They contained only an explicit *exemption* from state income tax and an *exception* that rendered that exemption a nullity upon federal divestiture, self-canceling provisions with *no* operative effect. If Respondent's theory were correct—that an express affirmative authorization to tax is required—then there never was such authorization. And yet, Respondent concedes it owed tax prior to 1985. Moreover, as noted above, courts uniformly approved the imposition of state income tax based on the compelling inference from the statutory language that Congress intended that these farm credit associations and banks be subject to tax upon divestiture. As discussed above in Section 1, the current language 12 U.S.C. § 2134 equally compels the conclusion that Congress intended to limit the tax exemption to those items specified in current statute.

Nevertheless, Respondent argues that current statutory language is somehow insufficiently worded to confine the tax exemption to those notes, bonds,

and debentures specifically mentioned. To support its argument Respondent has cited dicta in a number of cases suggesting that express affirmative authorization must be given. But an examination of those cases reveals that this Court has consistently used traditional canons of statutory construction to interpret Congress' tax exemptions and has never required exclusively explicit affirmative statutory authorization

Many of the cases on tax immunity for federal instrumentalities concerned national banks. Because Congress expressly authorized state taxation of real property belonging to the banks and shareholders' interest in the banks, the focus in many of these cases was on what was expressly allowed by Congress. Interestingly, even here the Court followed the statutory construction maxim *expressio unius est exclusio alterius*: from the authorization of certain state taxes the Court implied the exemption from others. *See First Agricultural Nat. Bank*, 392 U.S. at 343 (basing its decision solely on statute, this Court found "that 12 U.S.C. 548 was intended to prescribe the only ways in which the States can tax national banks.").

In *Austin* v. *Aldermen of Boston*, 74 U.S. 694, 699 (1869), the Court discussed the recently enacted statute permitting some state taxation of national banks and commented on the standard for waiver of immunity:

> [T]he waiver must be clear, and every well-grounded doubt upon the subject should be resolved in favor of the exemption.

The waiver there was express, but this Court said nothing about requiring an express waiver. It said only that what Congress intended to do must be "clear." This case is hardly precedent for requiring an express affirmative authorization.

In *Owensboro Nat. Bank* v. *City Of Owensboro*, 173 U.S. 664 (1899), in discussing the standard for determining the legality of the state tax, this Court noted as follows:

> [S]tates would be wholly without power to levy any tax, either direct or indirect, upon the national banks, their property, assets, or franchises, were it not for the permissive legislation of congress.

Id. at 668. Again, although the legislative permission at issue was expressed affirmatively with regard to national banks, there is nothing in the decision requiring permission to be so expressed. It simply must be clear that Congress in exempting certain state taxes intended to permit others.

Most revealing is the language the *Owensboro* Court cited as authority for its quoted conclusion:

> National banks are instrumentalities of the federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a state to define their duties, or control the conduct of their affairs, is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates

> the purpose of the national legislation or impairs the efficiency of these agencies of the federal government to discharge the duties for the performance of which they were created. These principles are axiomatic, and are sanctioned by the repeated adjudications of this court.

Id. at 668 (quoting *Davis* v. *Elmira Savings Bank*, 161 U.S. 275, 283 (1896)). In place of language establishing a requirement of express authorization we find familiar language of implied preemption standards looking to whether the state tax "conflicts" with federal law or "frustrates the purpose" of Congress' enactment.

In *Des Moines Nat. Bank* v. *Fairweather*, 263 U.S. 103 (1923), this Court also made a general statement sometimes cited as establishing a "requirement" for affirmative assent to tax:

> It is settled that the relation of the national banks to the United States and the purposes intended to be subserved by their creation are such that there can be no taxation, by or under state authority, of the banks, their property or the shares of their capital stock otherwise than in conformity with the terms and restrictions embodied in the assent given by Congress to such taxation.

Id. at 106. This unsurprising directive applicable to national banks does not require that assent must be in express *affirmative* terms so long as the assent is clear enough to enable States to conform.

A final case heavily relied upon by Respondent and the court below offers no support. In *United States* v. *Allegheny County*, 322 U.S. 174 (1944), the Court used language of express consent in dicta:

> But unshaken, rarely questioned, and indeed not questioned in this case, is the principle that possessions, institutions, and activities of the Federal Government itself in the absence of express congressional consent are not subject to any form of state taxation.

Id. at 177. This Court concluded in the absence of *any legislation at all* about the authority of States to tax government property on a contractor's land that the tax must fail under implied constitutional immunity. No legislation meant *no* waiver of immunity. *Id.* at 189 ("We find no support for the claim that the immunity has been waived. Congress certainly has not done so."). Thus, the nature of what would constitute "congressional consent" was not even at issue because Congress did not act.

On the other hand, where Congress has legislated the extent of immunity it believed appropriate, this Court has employed traditional statutory interpretation methods to determine Congress' intent. This Court's discussion of tax immunity in *Pittman* v. *Home Owners' Loan Corp. of Washington, D.C.*, 308 U.S. 21 (1939), is particularly instructive. At issue was whether Baltimore could charge the normal mortgage recording fee to the Home Owners' Loan Corp., a federal instrumentality. This Court concluded the city could not under *Federal Land Bank* v. *Crosland*, 261 U.S. 374 (1923). The city had relied on the language of the Home Owners' Loan

Act that specified what immunity the Home Owners' Loan Corp. enjoyed to argue that these fees were not included within that immunity. This Court reviewed the language of the Act:

> That provides that the Home Owners' Loan Corporation, its franchise, capital, reserves and surplus, and its loans and income shall be exempt from all state or municipal taxes. The critical term, in the present relation, is 'loans'. We think that this term, in order to carry out the manifest purpose of the broad exemption, should be construed as covering the entire process of lending, the debts which result therefrom and the mortgages given to the Corporation as security.

308 U.S. at 31-32 (footnote omitted). Particularly interesting is that this Court looked to the *statutory exemption* to see if the taxed activity was included within that exemption. This Court did not rely on the obvious fact that there was no *statutory authorization* for mortgage recording fees. The unmistakable implication is that by specifying what was exempt from tax in statute, this Court concluded that Congress was granting permission to tax other activities not included in the exemption.

Express affirmative congressional authorization is not required by any direct holding of this Court, only by "potentially mischievous dictum" in Judge Loken's apt phrase. *Farm Credit Services of Central Arkansas,* v. *State of Arkansas*, 76 F.3d 961, 965 (8th Cir. 1996) (Loken, J. dissenting). Because the decision below relied on that incorrect standard, it must be reversed.

Conclusion

Respondent is advocating a position that runs counter to what Congress clearly intended in providing a specific tax exemption to these farm credit entities. Respondent's position also runs counter to what constitutional tax immunity this Court would normally imply for privately owned entities of the kind that the NBC has become serving commercial, rather than governmental, interests. *Amicus* suggests that a vibrant federalism requires a rejection of this unwarranted extension of the implied immunity of *McCulloch*. This Court should reverse the decision below and affirm the authority of States to tax the income of these farm credit banks.

Respectfully submitted,

Paull Mines, General Counsel
Frank D. Katz,
Deputy General Counsel*
**Counsel of Record*
Multistate Tax Commission
444 No. Capitol St., NW #425
Washington, DC 20001-1538
(202) 624-8699

August 23, 2000

No. 99-1792

Supreme Court, U.S.
FILED
AUG 25 2000
8-25-2000
CLERK

IN THE

Supreme Court of the United States

DIRECTOR OF REVENUE OF MISSOURI,

Petitioner,

v.

COBANK ACB, AS SUCCESSOR TO THE NATIONAL BANK FOR COOPERATIVES,

Respondent.

On Writ of Certiorari to the Supreme Court of Missouri

BRIEF OF THE AMICUS CURIAE AMERICAN BANKERS ASSOCIATION IN SUPPORT OF PETITIONER

JOHN J. GILL III
Counsel of Record
MICHAEL F. CROTTY
MARK R. BARAN
AMERICAN BANKERS ASSOCIATION
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 663-5026

August 25, 2000

PRESS OF BYRON S. ADAMS ✦ WASHINGTON, D.C. ✦ 1-800-347-8208

26pp

QUESTION PRESENTED

Whether Congress, when it made technical changes to the Farm Credit Act in 1985, purposefully intended to confer broad state tax immunity upon privately owned, nontaxpayer-funded, profit-making Farm Credit System lending institutions.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICUS CURIAE 2

SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

I. THE DECISION OF THE SUPREME COURT OF MISSOURI IGNORES CLEAR CONGRESSIONAL INTENT TO SUBJECT PCAS AND COBANK TO STATE INCOME TAXATION 5

II. PCAS AND COBANK ARE NEITHER THE FEDERAL GOVERNMENT NOR ITS LAWFUL INSTRUMENTALITIES 11

III. CONFERRING BROAD TAX IMMUNITY TO PCAS AND COBANK WOULD HAVE A NEGATIVE COMPETITIVE IMPACT ON THE COMMERCIAL AGRICULTURAL BANKING INDUSTRY 16

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES:

Arkansas v. Farm Credit Serv. of Cent. Ark., 520 U.S. 821 (1997) 13

Baker Prod. Credit Ass'n v. State Tax Comm'n, 421 P.2d 984 (Or. 1966) (en banc) 10

Colorado Springs PCA v. Farm Credit Administration, 967 F.2d 648 (D.C. Cir. 1992) 8

Columbus PCA v. Bowers, 180 N.E.2d 1 (Ohio 1962) 10

Department of Employment v. United States, 385 U.S. 355 (1966) 9, 14

Federal Land Bank v. Board of County Comm'rs, 368 U.S. 146 (1961) 9

First Agric. Nat'l Bank of Berkshire v. State Tax Comm'n, 392 U.S. 339 (1968) 9, 12

Graves v. New York, 306 U.S. 466 (1939) 14

McCulloch v. Maryland, 17 U.S. 316 (4 Wheat.)(1819) .. 9, 11

Montana Livestock PCA v. State, 393 P.2d 50 (Mont. 1964) 10

Production Credit Ass'n of Eastern N.M. v. Taxation & Revenue Dept., 999 P.2d 1031 (N.M. Ct. App. 2000 *cert. denied*, 997 P.2d 820 (N.M. 2000), *petition for cert. filed*, 69 U.S.L.W. 3111 (U.S. July 28, 2000) (No. 00-156) 9

United States v. Boyd, 378 U.S. 39 (1964) 14

United States v. County of Allegheny, 322 U.S. 174 (1944)... 9

United States v. Township of Muskegon, 355 U.S. 484 (1958) 14

Woodland PCA v. Franchise Tax Board, 37 Cal.Rptr. 231 (Dist.Ct.App. 1964) 10

STATUTES:

Pub. L. No. 64-158, 39 Stat. 360 (1916) 5

Pub. L. No. 73-98, 48 Stat. 257 (1933) 6

Pub. L. No. 92-181, 85 Stat. 583 (1971) 6

12 U.S.C. § 1271 6

12 U.S.C. § 1752(1) 15

12 U.S.C. § 1768 14

12 U.S.C. § 2077 ..... 3, 4, 10

12 U.S.C. § 2098 7

12 U.S.C. § 2134 ..... 3,4, 10

12 U.S.C. § 2141 6

I.R.C. § 501(c)(1) 15

RULINGS:

Rev. Rul. 69-283; 1969 C.B. 156 15

LEGISLATIVE MATERIAL:

S. Rep. 124 (1933) 6

H.R. Rep. No. 287, 86th Congress, 1st Sess. 1, *reprinted in* 1959 U.S.C.C.A.N. 2123 4

H.R. Rep. No. 425, 99th Congress, 1st Sess. 5 (1985), *reprinted in* 1985 U.S.C.C.A.N. 2587 8

62 Fed. Reg. 4429 (1997) 17

65 Fed. Reg. 45,066 (2000) 17

65 Fed. Reg. 45,931 (2000) 17

MISCELLANEOUS:

Black's Law Dictionary (5th ed. 1983) 11

Farm Credit System, Annual Information Statement -1999. Published by Federal Farm Credit Banks Funding Corporation (2000) 6, 18

Paul J. Hartman, *Federal Limitations on State and Local Taxation* (1981) 12

In The
SUPREME COURT OF THE UNITED STATES
October Term, 2000

No. 99-1792

DIRECTOR OF REVENUE OF MISSOURI,

Petitioner,

v.

COBANK ACB, AS SUCCESSOR TO THE NATIONAL BANK FOR COOPERATIVES,

Respondent.

On Writ of Certiorari to the Supreme Court of Missouri

BRIEF OF THE AMICUS CURIAE[1] AMERICAN BANKERS ASSOCIATION IN SUPPORT OF PETITIONER

---

[1] No counsel for any party had any role in authoring this brief and no person other than amicus curiae made any monetary contribution to its preparation or submission. Sup. Ct. R. 376.

In accordance with the provisions of Rule 37.3(a) of the Supreme Court Rules, the American Bankers Association respectfully submits this brief as amicus curiae in support of the Petitioner. Both parties have consented to this filing and their written consents are filed together with this brief.

INTEREST OF THE AMICUS CURIAE

The American Bankers Association is the principal trade association of the banking industry in the United States, representing banks in each of the fifty states and the District of Columbia, including both national and state-chartered banks. The Association membership includes community, regional, and money center banks, as well as bank holding companies, savings associations, trust companies and savings banks, with combined assets totaling over ninety percent of all banking assets in the United States.

The decision of the Supreme Court of Missouri involves the tax status of three production credit associations (PCAs) and the last remaining agricultural credit bank and bank for cooperatives (CoBank). The precise issue in this case has created considerable controversy within the banking community and courts in various states have differed sharply in their decisions. We believe that the appropriate tax status of these Farm Credit System (FCS) lending institutions raises fundamental legal and public policy tax issues of substantial importance to the commercial banking industry - agricultural banks in particular. PCAs and CoBank are direct retail lenders, no longer owned by the United States government, and serve no governmental role or function warranting an exemption from state and local taxation. Yet, the Supreme Court of

Missouri relied solely upon the institutions' classification as a federal instrumentality to justify tax immunity in this case. Such a narrow interpretation of the Supremacy Clause ignores clear legislative intent and would have a profound impact on the banking industry.

The American Bankers Association believes that the views of the banking industry will assist the Court in deciding the merits of this case. If broad tax immunity is upheld in this case, the unique competitive advantages that currently exist for FCS lending institutions would be unnecessarily strengthened at the expense of other similarly-situated taxpaying financial institutions. Undeniably, PCAs and CoBank are private, commercial, profit-generating, retail lending institutions. Since the 1960's, the United States has held no ownership interest in these institutions and state taxes have been imposed and collected. PCAs and CoBank should continue to legally assume their fair share of responsibility for the cost of state governments, whose benefits they receive and whose protection they enjoy.

SUMMARY OF ARGUMENT

This case involves the proper interpretation of 12 U.S.C. sections 2134 and 2077, and the extent to which certain privately owned, profitable, FCS lending institutions should benefit from a constitutional immunity from state taxation.

Under 12 U.S.C. section 2134, Congress designated banks for cooperatives as federal instrumentalities and exempted the notes, debentures, and obligations issued such banks for cooperatives from all taxation (except surtaxes, estate, inheritance, and gift taxes); section 2077 provides a

similar designation and exemption for a production credit association's notes, debentures, and obligations. Prior to the Farm Credit Act of 1985, special income tax language was contained in each of these sections. This language provided an income tax immunity for the PCAs and CoBank that was contingent upon a continued ownership interest by the United States government. However, the United States divested ownership in both PCAs and CoBank. Thus, since 1971, the tax exemption has not been applied and both PCAs and CoBank have been subject to and paid applicable nondiscriminatory state and local taxes.

In certain circumstances, the Supremacy Clause should permit courts to review legislative history, all relevant facts, and to set appropriate limits on state taxation consistent with congressional intent. Based upon the legislative history of the 1985 changes to 12 U.S.C. sections 2134 and 2077, it is clear that Congress did not intend to purposefully remove the government ownership tax contingency language and to provide a blanket tax immunity for PCAs and CoBank. The changes that occurred in 1985 were unrelated to the tax status of these FCS lending institutions. Instead, the changes were considered "technical and conforming." Thus, the Supreme Court of Missouri ignored clear legislative intent to subject PCAs and CoBank to state income taxation.

Both PCAs and CoBank function much like and engage in the same activities as other private taxpaying financial institutions. Further, PCAs and CoBank are increasingly benefiting from less restrictive regulations to the detriment of competitors offering comparable financial services. If the Court upholds the decision of the Supreme Court of Missouri, the competitiveness of the agricultural lending market would be threatened and Congress'

continuing desire to transform the FCS from a government system to a privately-owned and controlled system would be compromised.[2]

ARGUMENT

I. THE DECISION OF THE SUPREME COURT OF MISSOURI IGNORES CLEAR CONGRESSIONAL INTENT TO SUBJECT PCAS AND COBANK TO STATE INCOME TAXATION.

Though PCAs and CoBank are statutorily designated federal instrumentalities, Congress clearly intended to subject these specific FCS lending institutions to state income taxation. The FCS lending institutions are a vital component of a powerful nationwide network of lending institutions and financial entities within the Farm Credit System, which was initially created in 1916 pursuant to the Federal Farm Loan Act. *See* Pub. L. No. 64-158; 39 Stat. 360 (1916). This Act created twelve Federal Land Banks that were partially owned and funded by the Federal government. The current FCS is a result of several modifications made by Congress over the years in response to the needs of the agricultural lending market. The FCS is currently comprised of six farm credit banks and their 172 local associations (17 federal land bank associations, 57 production credit associations, 49 agricultural credit

---

[2] H.R. Rep. No. 287, 86th Cong., 1st Sess. 1 (1959), *reprinted in* 1959 U.S.C.C.A.N. 2123.

associations, and 49 federal land credit associations), and one agricultural credit bank or bank for cooperatives (CoBank).[3]

In response to economic conditions during the Great Depression, banks for cooperatives (BFCs) and production credit associations were both created by the Farm Credit Act of 1933. *See* Pub. L. No. 73-98, 48 Stat. 257 (1933). CoBank ACB, which finances cooperatives and agricultural businesses nationally, is the successor in interest to the National Bank for Cooperatives and the sole remaining agricultural credit bank and bank for cooperatives after a series of mergers and consolidations.[4] CoBank is an $18.6 billion institution that provides lending to both individual borrowers and other cooperatives. Production credit associations, with total assets of over $7 billion, were created to provide short- and intermediate- term loans to farmers and ranchers. *See* S. Rep. 124, at 2 (1933). The average production credit association holds approximately $140 million in assets while the average agricultural bank holds $62.5 million in assets. PCAs and CoBank are also statutorily classified as "federal instrumentalities." 12 U.S.C. sections 1271 and 2141. As such, they are entitled to certain advantages, including those explicitly enumerated by statute.

---

[3] *Farm Credit System, Annual Information Statement – 1999.* Published by the Federal Farm Credit Banks Funding Corporation on February 24, 2000.

[4] CoBank ACB was formed in 1995 from a consolidation of the National Bank for Cooperatives and two other entities. In 1999, the sole remaining independent bank for cooperatives also merged into CoBank.

In the Farm Credit Act of 1971, Congress made significant changes to the existing Farm Credit Act, including a number of revisions concerning the operation and structure of the FCS. *See* Pub. L. No. 92-181, § 2.17, 85 Stat. 583, 602 (1971). At that time, Congress retained the contingent tax exemption provisions affecting PCAs and CoBank.[5] Within the Farm Credit Act of 1971, the tax provisions for both PCAs and CoBank were identical:

> Each [production credit association or banks for cooperatives] and its obligations are instrumentalities of the United States. Such [production credit associations or banks for cooperatives], their property, their franchises, capital, reserves, surplus, and other funds, and their income shall be exempt from all taxation now and hereafter imposed by the United States or any State, territorial, or local taxing authority; ... except that any real and personal property of such [production credit associations or banks for cooperatives] shall be subject to federal, State, territorial, and local taxation to the same extent as similar property is taxed. The exemption provided in the preceding sentence shall apply only

---

[5] The tax provisions for PCAs were formerly designated 12 U.S.C. § 2098 and now codified in 12 U.S.C. § 2077. It has remained essentially the same as the Farm Credit Act of 1933 as it relates to the provision for exemption from Federal, State and local taxation for notes, debentures, or other obligations issued by production credit associations, and the United States stock ownership contingency associated with the waiver from Federal, state and local income taxation.

> for any year or part thereof in which stock in the [production credit association or banks for cooperatives] is held by the Governor of the Farm Credit Administration.

Id. (emphasis added).

The two underlined sentences of the preceding paragraph were deleted during non tax-related technical and conforming amendments to the Farm Credit Act in 1985. PCAs and CoBank now claim that such changes created an even broader tax exemption than what was contained in the statute in 1971. While federal instrumentality status does confer special tax privileges, no implicit or explicit action was taken by Congress to purposefully create a broad tax exemption. Indeed, Congress' intent in the area of taxation was never questioned, especially since the government relinquished its ownership interest several decades ago. A Congressional Committee report described the removal of United States government ownership contingency language as a technical amendment. *See* H.R. Rep. No. 425, 99th Cong., 1st Sess. 5 (1985), *reprinted in* 1985 U.S.C.C.A.N. 2587, 2591. These technical amendments contained in the Farm Credit Amendments Act of 1985 included changes to the powers and duties of the Farm Credit Administration and the replacement of the Governor of the Farm Credit Administration with a three-member board. *See generally Colorado Springs PCA v. Farm Credit Admin.*, 967 F.2d 648 (D.C. Cir. 1992). Therefore, no substantive tax changes were made nor intended by Congress in 1985.

As a result of the 1985 changes, the waiver of tax immunity language in the statute was omitted from the text. Although Congress did retain language subjecting interest on obligations to Federal income taxation in the hands of

the holder, nothing in the legislative history of this Act indicates an intent or even a remote mention by Congress to create a sweeping income tax immunity for PCAs and CoBank. Hearings most likely would have been held or notations made by the appropriate committees of jurisdiction or even individual members of Congress if such broad tax immunity was intended to be congressionally created.

Since *McCulloch v. Maryland,* 17 U.S. 316 (4 Wheat.) (1819), it has been clear that states are without power to tax federal instrumentalities under the Supremacy Clause of the United States Constitution unless this immunity is otherwise waived by Congress. *See, e.g., First Agric. Nat'l Bank of Berkshire v. State Tax Comm'n*, 392 U.S. 339, 340 (1968); *Department of Employment v. United States*, 385 U.S. 355, 358 (1966); *Federal Land Bank v. Board of County Comm'rs*, 368 U.S. 146, 149 (1961); *United States v. County of Allegheny*, 322 U.S. 174, 176 (1944). If Congress is silent, then the Supremacy Clause would prevent a state from imposing taxes on a federal instrumentality. U.S. Const. Art. VI, cl. 2.

The Court of Appeals of New Mexico in *Production Credit Ass'n of Eastern N.M. v. Taxation & Revenue Dept,* 999 P.2d 1031 (N.M. Ct. App. 2000), *cert. denied*, 997 P.2d 820 (N.M. 2000), *petition for cert. filed,* 69 U.S.L.W. 3111 (U.S. July 28, 2000) (No. 00-156) did acknowledge a PCA's inherent immunity from state taxation, but did not find the statute following the 1985 technical amendments to be clear and unambiguous on the subject of tax immunity. In the face of ambiguity, the New Mexico appeals court in *Eastern New Mexico* found it necessary to determine legislative intent and held that "neither the 1985 Act nor its legislative history indicates

any intention by Congress to purposefully remove the long-standing waiver of immunity from privately owned credit associations." *Id.* at 1037.

For decades, PCAs and CoBank could not avail themselves of the statutory immunity from state and local taxation.[6] Why should PCAs and CoBank now be entitled to aggravate the spirit and protection intended to be afforded by the Supremacy Clause? In this case, it is obvious that the deletion of the contingency language in 12 U.S.C. sections 2134 and 2077 in 1985 did not translate into purposeful Congressional silence with the intent to provide a broad tax immunity to PCAs and CoBank. It hardly seems plausible that Congress, by deleting unnecessary language in 1985, intended to enlarge the scope of immunity for PCAs and CoBank. Congress' intent concerning tax immunity for PCAs and CoBank is clear in this case. Therefore, when Congress makes statutory changes and does not purposefully or meaningfully indicate its intentions on a subject as substantive as tax immunity, congressional silence should not be presumed and the Supremacy Clause should not prevent further judicial inquiry into legislative intent.

---

[6] It should be noted that, until recently, attempts by production credit associations in a claim of waiver from state taxation were unsuccessful. *See, e.g.,Baker Prod. Credit Ass'n v. State Tax Comm'n*, 421 P.2d 984 (Or. 1966) (en banc) ; *Woodland PCA v. Franchise Tax Board*, 37 Cal.Rptr. 231 (Dist.Ct.App.1964); *Montana Livestock PCA v. State*, 393 P.2d 50 (Mont. 1964); *Columbus PCA v. Bowers*, 180 N.E.2d 1 (Ohio 1962).

II. PCAs AND CoBANK ARE NEITHER THE FEDERAL GOVERNMENT NOR ITS LAWFUL INSTRUMENTALITIES.

Though statutorily designated as a federal instrumentality, PCAs and CoBank do not possess the attributes commonly understood and ordinarily associated with federal agencies. Black's Law Dictionary defines a federal instrumentality as "[a] means or agency used by the federal government. A government agency immune from state control." *Blacks Law Dictionary*, Fifth Edition (1983). PCAs and CoBank are not agencies *used* by the federal government and their structure, activities, and operations bear no relationship to that of a typical government agency.

A history of the state taxation of national banks illustrates the application of the tax immunity to instrumentalities *used* by the federal government. While state-chartered banks have usually been subject to state taxation, national banks were considered constitutionally immune from some forms of state taxation due to the unique role and function they once served. In the landmark case of *McCulloch v. Maryland*, *supra*, the Court established an implied constitutional tax immunity in a case involving a discriminatory tax assessed against the Second Bank of the United States. This case established the longstanding precedent preventing states from imposing taxes on federal instrumentalities. Though Congress may designate entities as federal instrumentalities that are accorded special tax benefits, the bank in *McCulloch* is clearly distinguishable from today's national banks, PCAs and CoBank. The Second National Bank of the United States in *McCulloch* was owned and controlled by the United States government. During that time, national banks

were true federal instrumentalities in the sense that they were owned and operated by the Federal government. The Court was also placed in an unenviable position of establishing judicial policy when the United States, "having only tiny revenues of less than $25 million, was quite weak in comparison with the relatively strong state governments."[7]

Over the years, however, the notion of banks as instrumentalities of the Federal government created for a public purpose has eroded even though the intergovernmental tax immunity doctrine, applied to a national bank as a federal instrumentality, was upheld in *First Agric. Nat'l Bank, supra*, 392 U.S. 339 (1968) (Marshall, J., dissenting). In holding that states are without power to tax national banks, unless authorized by Congress, the Court stated that "[b]ecause of pertinent legislation in the banking field, we find it unnecessary to reach the constitutional question of whether national banks should be considered nontaxable as federal instrumentalities. *Id.* at 341. In the case of PCAs and CoBank, the language in the statute concerning tax immunity is silent. However, Congress was not.

In determining whether a private entity should be treated as immune from state taxation, courts should analyze the entity claiming federal instrumentality privileges. PCAs and CoBank are completely private, profitable, retail lending institutions. In his dissent in *First Agric. Nat'l Bank*, Justice Marshall offered the following observation about national banks:

---

[7] Paul J. Hartman, *Federal Limitations on State and Local Taxation,* § 6.4, at 247 (1981).

> ... a national bank cannot be considered a tax immune federal instrumentality. It is a privately owned corporation existing for private profit of its shareholders. It performs no significant federal governmental function that is not performed equally by state-chartered banks. Government officials do not run its day-to-day operations nor does the Government have any ownership interest in a national bank.

Id. at 354.

Though the ruling involved an unrelated jurisdictional issue under the Tax Injunction Act, in *Arkansas v. Farm Credit Serv. of Cent. Ark.*, 520 U.S. 821 (1997), this Court also recognized the private nature of PCAs. In delivering the opinion of the Court, Justice Kennedy wrote:

> [t]he PCA's' business is making commercial loans, and all their stock is owned by private entities. Their interests are not coterminous with those of the Government any more than most commercial interests. Despite their formal and undoubted designation as instrumentalities of the United States, and despite their entitlement to those tax immunities accorded by the explicit statutory mandate, PCA's do not have or exercise power analogous to that of the NLRB or any of the departments or regulatory agencies of the United States.

Id. at 831-832.

A similar analysis should be made with respect to CoBank

or, alternatively, for any private entity seeking a tax status consistent with that of a government-owned federal instrumentality. For example, in *Department of Employment v. United States*, 385 U.S. 355 (1966), the Court conferred federal instrumentality status on the Red Cross, even though it is a private entity, reasoning that a statute and Executive Order "devolved upon the Red Cross ... a wide variety of functions indispensable to the workings of our Armed Forces around the globe, and to assist the Federal vernment in providing disaster assistance to the States in time of need." *Id.* at 418. Sound legal analysis concerning the activities, structure, control, and ownership by the federal government were similarly performed in other cases before the Court. *See, e.g., Graves v. New York*, 306 U.S. 466 (1939); *United States v. Boyd*, 378 U.S. 39 (1964); *United States v. Township of Muskegon*, 355 U.S. 484 (1958). If such an examination were performed in this case, a different result may have been reached.

The tax status of federal credit unions is an important contrast to the varied applications of constitutional immunity extended to federal instrumentalities. Federal credit unions are granted a specific immunity from Federal and state taxation in 12 U.S.C. § 1768, without any corresponding congressional designation as a federal instrumentality. Such a contrast is significant because comparable financial service providers, including commercial bank lenders, savings institutions, federal credit unions, PCAs, and CoBank are similarly situated financial institutions, albeit serving their own

statutorily created public purpose.[8] Unlike these FCS lending institutions, however, the exemption from taxation for federal credit unions is clear and specific. The Federal Credit Union Act does not designate federal credit unions as federal instrumentalities, but they do enjoy explicit statutory tax advantages.[9] PCAs and CoBank, as statutorily declared federal instrumentalities, should not receive preferential tax treatment simply because they have apparently found a convenient loophole in the law.

---

[8] Under 12 U.S.C. § 1752 (1), a federal credit unions is defined as "a cooperative association organized in accordance with the provisions of this chapter for the purpose of promoting thrift among its members and creating a source of credit for provident or productive purposes."

[9] *Cf* Rev. Rul. 69-283; 1969 C.B. 156 (Federal credit unions are recognized as U.S. instrumentalities by the I.R.S. and are considered exempt under I.R.C. § 501(c)(1). However, since they are not wholly owned by the U.S., credit unions must file a Form 990 Annual Information Return).

III. CONFERRING BROAD TAX IMMUNITY TO PCAS AND COBANK WOULD HAVE A NEGATIVE COMPETITIVE IMPACT ON THE COMMERCIAL AGRICULTURAL BANKING INDUSTRY.

The structure and operations of the FCS are similar to the current commercial banking system in the areas of examination, enforcement, capital and compliance requirements, and regulatory powers. As noted earlier, the FCS consists of (1) the Farm Credit Administration, which is the primary federal regulator that examines and supervises all System institutions, (2) the Farm Credit System Insurance Corporation, which insures the principal and interest on the System-wide debt securities, and (3) the Federal Farm Credit Banks Funding Corporation, which manages the sale of System-wide debt securities. In addition, the FCS has six farm credit banks that act as wholesalers of funding to the retail lending associations. There are approximately 172 retail-lending associations deployed around the country. There is one agricultural lending bank (CoBank), which finances agricultural cooperatives and agricultural businesses nationally. Finally, there is Farm Credit Leasing (82% owned by CoBank) that makes retail and commercial sized leases for farmers, ranchers, rural consumers, and farm-related service businesses. In 1999, Farm Credit Leasing was recognized as the seventh largest independent leasing company in the United States and the 52nd largest leasing company overall with assets under management of more than $1.2 billion. This demonstrates that the FCS is a major lender in the financial services marketplace.

Although the number of institutions within the system has declined in the past decade, new regulations that removed many lending restrictions, and accelerated

consolidations have created larger and more powerful lending institutions.[10] Recently, the Farm Credit Administration announced that that they would accept applications from FCS institutions for national charters. 65 Fed. Reg. 45,066 (2000). National charters will remove long-standing geographic restrictions and allow, for the first time, FCS lending institutions to lend money anywhere in the country. In addition, it has been proposed by the Farm Credit Administration that FCS lending institutions be permitted to purchase 100% loan participations from non-farm credit system lenders. 65 Fed. Reg. 45,931 (2000). The Farm Credit Administration currently requires borrowers to purchase stock in Farm Credit System institutions. Now, FCS institutions can buy 100% of loans from banks and others, and there is no stock ownership requirement. Essentially, FCS is acting just like any other private correspondent bank. Commercial bankers, particularly agricultural banks, cannot compete in an FCS environment that offers unfair tax and regulatory advantages to these privately owned competitors.

Another unique competitive advantage enjoyed by PCAs and CoBank is their special government sponsored entity status (GSE). However, unlike other GSEs, such as the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Federal Home Loan Bank System, and the Student Loan Marketing Association, FCS lending institutions are direct retail lenders and fierce competitors of commercial banks. Their GSE status, which

---

[10] *See, e.g.*, 62 Fed. Reg. 4429 (1997). In 1997, the Farm Credit Administration issued final regulations significantly expanding the scope and eligibility of the FCS's lending operations.

allows FCS institutions to access funds at near-Treasury rates, gives them a tremendous advantage over banks and other lenders.

Finally, the most profound effect of the decision of the Supreme Court of Missouri is the probable economic hardship such a blanket tax immunity would have on other comparable private section lenders, including banks. If the decision were upheld, the cost to PCAs and CoBank of conducting their retail lending businesses would be dramatically decreased. It logically follows that any legislative or judicial removal of any provision for taxes, without any corresponding public policy or compelling legal reason, would allow PCAs and CoBank to offer much lower rates on short- and intermediate-term loans and, in turn, provide private owners with a significant return on their investments to the detriment of similarly situated taxpaying commercial bank shareholders.

The Farm Credit System reported year-end total assets of $88.7 billion at the end of 1999. Its institutions recorded a profit of $1.23 billion in 1999, exceeding commercial farm banks on an average return on assets, and the percentage increase of total loans and assets. Yet, the most meaningful entry contained in the financial reports is the provision for state, local, and federal income taxes. For the year ending 1999, the FCS provision for income taxes was $172 million.[11] By upholding the lower court decision in the Supreme Court of Missouri, the FCS provision for taxes would be drastically reduced, thus creating a significant negative impact on competitiveness of the agricultural lending market. Surely, Congress did not

---

[11] *See Farm Credit System Annual Information Statement – 1999*, *supra*, at 3.

intend such a result. Therefore, respondent's claim of immunity from taxation has noteworthy economic and competitive consequences that greatly outweigh any valid claim for constitutional immunity as a federal instrumentality.

CONCLUSION

There are no compelling legal justifications for conferring broad state tax immunity upon PCAs and CoBank. For the reasons cited above, the decision of the Supreme Court of Missouri should be reversed.

Respectfully submitted,

John J. Gill III
Counsel of Record
Michael F. Crotty
Mark R. Baran
American Bankers Association
1120 Connecticut Ave., N.W.
Washington, DC 20036
(202) 663-5026
Counsel for Amicus Curiae

August 25, 2000

(9)

No. 99-1792

Supreme Court, U.S.
FILED
AUG
AUG 24, 2000
OFFICE OF THE CLERK

IN THE UNITED STATES SUPREME COURT

DIRECTOR OF REVENUE, STATE OF MISSOURI,
Petitioner,

vs.

COBANK ACB, AS SUCCESSOR TO THE
NATIONAL BANK FOR COOPERATIVES,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSOURI

BRIEF AMICUS CURIAE OF THE STATES OF OHIO, ALASKA, ARIZONA, FLORIDA, GEORGIA, HAWAII, ILLINOIS, INDIANA, LOUISIANA, MARYLAND, MICHIGAN, MISSISSIPPI, MONTANA, NEBRASKA, NEW HAMPSHIRE, NEW YORK, NORTH DAKOTA, OKLAHOMA, OREGON, SOUTH DAKOTA, VERMONT, AND WASHINGTON IN SUPPORT OF PETITIONER

BETTY D. MONTGOMERY
Attorney General of Ohio
EDWARD B. FOLEY
State Solicitor
ROBERT C. MAIER*
Assistant Solicitor
*Counsel of Record
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-8980

38 pp

BRUCE M. BOTELHO
Attorney General
State of Alaska

JANET NAPOLITANO
Attorney General
State of Arizona

ROBERT A. BUTTERWORTH
Attorney General
State of Florida

THURBERT E. BAKER
Attorney General
State of Georgia

EARL I. ANZAI
Attorney General
State of Hawaii

JAMES E. RYAN
Attorney General
State of Illinois

KAREN M. FREEMAN-WILSON
Attorney General
State of Indiana

RICHARD P. IEYOUB
Attorney General
State of Louisiana

J. JOSEPH CURRAN, JR.
Attorney General
State of Maryland

JENNIFER M. GRANHOLM
Attorney General
State of Michigan

MIKE MOORE
Attorney General
State of Mississippi

JOSEPH P. MAZUREK
Attorney General
State of Montana

DON STENBERG
Attorney General
State of Nebraska

PHILIP T. McLAUGHLIN
Attorney General
State of New Hampshire

ELIOT SPITZER
Attorney General
State of New York

HEIDI HEITKAMP
Attorney General
State of North Dakota

W.A. DREW EDMONDSON
Attorney General
State of Oklahoma

HARDY MYERS
Attorney General
State of Oregon

MARK BARNETT
Attorney General
State of South Dakota

WILLIAM H. SORRELL
Attorney General
State of Vermont

CHRISTINE O. GREGOIRE
Attorney General
State of Washington

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

STATEMENT OF *AMICI* INTEREST 1

SUMMARY OF ARGUMENT 4

ARGUMENT 8

A. A State needs no consent from Congress to impose nondiscriminatory taxes on the property, transactions and income of a federally chartered, but privately owned commercial lending business 8

B. Because Congress systematically addressed the scope of state tax immunity in the Farm Credit Act, no non-statutory doctrine of immunity applies 16

1. *Expressio unius* defeats the NBC's immunity claim 16

2. Because Congress adopted the method of explicitly specifying immunities in the Farm Credit Act, no immunities should be recognized under the Act except those explicitly authorized by statute 21

C. Principles of federalism call for a "clear statement" of Congress's intent to grant immunity 26

CONCLUSION 28

TABLE OF AUTHORITIES

PAGE

CASES:

In re: Appeal of Farm Credit Services of Central Kansas et al., Nos. 1998-2839-DT, et al., 1999 Kan. Tax LEXIS 78 (Oct. 25, 1999) 26

Arkansas v. Farm Credit Services of Central Arkansas, 520 U.S. 821 (1997) 3, 6, 11, 13, 14

Arkansas v. Farm Credit Services of Central Arkansas, No. 95-1918 14

Cipollone v. Ligget Group, Inc., 505 U.S. 504 (1992) 7, 17, 18

City of Chicago v. Environmental Defense Fund, 511 U.S. 328 (1994) 20

CoBank ACB v. Fisher, No. 99CV437 (Colo. Dist. Ct. June 15, 2000) 26

Davis v. Elmira Savings Bank, 161 U.S. 275 (1896) 12

Davis v. Michigan Department of Treasury, 489 U.S. 803 (1989) 9

Department of Revenue v. ACF Industries, Inc., 510 U.S. 332 (1994) 7, 26, 27

Farm Credit Services of Central Arkansas v. Arkansas, 994 S.W.2d 453 (Ark. 1999), cert. denied sub nom., *Arkansas v. Farm Credit Services of Central Arkansas*, No. 99-993, 68 U.S.L.W. 3613, 120 S. Ct. 1530 (Mar. 27, 2000) 25

Farm Credit Services of Mid-America v. Department of State Revenue, 677 N.E.2d 645 (Ind. Tax 1997) 24

Farm Credit Services of Mid-America v. Department of State Revenue, 705 N.E.2d 1089 (Ind. Tax 1999) 24

In re Farm Credit Services of Western New York ACA, Nos. 816576, 816604, 816605, 816606, 2000 N.Y. Tax LEXIS 7 (Jan 13, 2000) 26

Federal Land Bank v. Bismarck Lumber Co., 314 U.S. 95 (1941) 13, 14

Federal Land Bank v. Board of County Commissioners, 368 U.S. 146 (1961) 14

Federal Land Bank v. Priddy, 295 U.S. 229 (1935) 14

First Agricultural National Bank v. State Tax Commission, 392 U.S. 339 (1968) 10, 12, 21, 22

Freightliner Corp. v. Myrick, 514 U.S. 280 (1995) 18

Graves v. New York ex rel. O'Keefe, 306 U.S. 466 (1939) 9, 14

Gregory v. Ashcroft, 501 U.S. 452 (1991) 27

Intel Containers International Corp. v. Huddleston, 507 U.S. 60 (1993) 17

Jefferson County, Alabama v. Acker, 119 S. Ct. 2069 (1999) 6, 9, 16

Keene Corp. v. United States, 508 U.S. 200 (1993) 20

Mayo v. United States, 319 U.S. 441 (1943) 5, 11

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) ..... passim

Northwest Lousiana PCA v. State of La. Department of Revenue and Taxation, 746 So.2d 280 (La. App. 1999) 25

Owensboro National Bank v. Owensboro, 173 U.S. 664 (1898) 11, 12, 21

PCA of Eastern N.M. v.
Taxation and Revenue Department,
No. 20,078, 2000 N.M. App. LEXIS 8
(Feb. 1, 2000), *review denied*,
997P.2d 820 (N.M., Mar. 13, 2000), *cert. petition*
docketed July 28, 2000 (No. 00-156).....26

Rockford Life Insurance Co. v.
Illinois Department of Revenue,
482 U.S. 182 (1987).....16

Rodriguez v. United States,
480 U.S. 522 (1987).....20

Smith v. Davis, 323 U.S. 111 (1944).....17

South Carolina v. Baker, 485 U.S. 505 (1988).....15

United States v. County of Fresno,
429 U.S. 452 (1977).....4, 8, 9

United States v. Detroit, 355 U.S. 466 (1958).....16

United States v. New Mexico,
455 U.S. 720 (1982).....4, 8

Wardair Canada, Inc. v.
Florida Department of Revenue,
477 U.S. 1 (1986).....17

Washington v. United States,
460 U.S. 536 (1983).....15

Wisconsin v. J.C. Penney Co.
311 U.S. 435 (1940).....27

STATUTES:

Agricultural Credit Act of 1987,
Pub. L. 100-233, 101 Stat. 1639, §413 (1988).....19

Agricultural Credit Technical Corrections Act
of 1988, Pub. L. 100-399,
102 Stat. 989, 1003 (1988).....25

Farm Credit Act Amendments of 1980,
Pub. L. 96-592, §404,
94 Stat. 3437, 3447-48 (1980).....23

Farm Credit Act of 1971, Pub. L. No. 92-181
85 Stat. 583 (1971)..... passim
§§2.17, 3.13, 85 Stat. 602, 608.....23

Farm Credit Act of 1933,
72nd Cong., 2nd Sess., ch. 98, §63,
48 Stat. 257, 267 (1933).....23

Federal Farm Loan Act of 1916,
64th Cong., 1st Sess., ch. 245, §26,
39 Stat. 360, 380 (1916).....23

12 U.S.C. 531.....12

12 U.S.C. 1768.....12

12 U.S.C. 2023.....19, 24

12 U.S.C. 2077 ..... 19, 24

12 U.S.C. 2098 ..... 19, 20, 24

12 U.S.C. 2134 ..... passim

OTHER AUTHORITY:

J. Kayl, Note, "Farm Credit Amendments Act of 1985: Congressional Intent, FCA Implementation, and Courts' Interpretation (and the Effect of Subsequent Legislation on the 1985 Act)," 37 Drake L. Rev. 271, 275 (1987-88) 11

No. 99-1792

IN THE UNITED STATES SUPREME COURT

DIRECTOR OF REVENUE, STATE OF MISSOURI,
Petitioner,

vs.

COBANK ACB, AS SUCCESSOR TO THE NATIONAL BANK FOR COOPERATIVES,
Respondents.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSOURI

BRIEF AMICUS CURIAE OF THE STATES OF OHIO, ALASKA, ARIZONA, FLORIDA, GEORGIA, HAWAII, ILLINOIS, INDIANA, LOUISIANA, MARYLAND, MICHIGAN, MISSISSIPPI, MONTANA, NEBRASKA, NEW HAMPSHIRE, NEW YORK, NORTH DAKOTA, OKLAHOMA, OREGON, SOUTH DAKOTA, VERMONT, AND WASHINGTON IN SUPPORT OF PETITIONER

STATEMENT OF *AMICI* INTEREST

Amicus State of Ohio and 21 other *amici* States write to urge that the Court reverse the decision of the Supreme Court of Missouri. The States also write to place the particular issue presented here in its broader context. The question framed is quite precise: "Does 12 U.S.C. Section 2134 authorize states to tax the

income of the National Bank for Cooperatives, a federally chartered instrumentality of the United States?" But how the Court answers that question implicates far more than state taxation of the "National Bank for Cooperatives" (the "NBC"). At a minimum, the Court's analysis will affect some of the other federally chartered entities within the Farm Credit System. As of July 1, 2000, the Farm Credit Administration's Office of Policy and Analysis enumerated these institutions at 165. Of those, 53 were production credit associations, which have an immunity statute identical to the NBC's; and 44 were agricultural credit associations, which resulted from mergers of entities that had differing immunity statutes, but which themselves have no clearly applicable immunity statute.

When facing the question whether such entities are immune, state tax administrators need a reasonably simple method of ascertaining immune status that is consistent with the State's plenary, sovereign power to tax. At one extreme is the principle proposed by respondent and embraced by the Missouri Supreme Court: Farm Credit System institutions on this theory are generally immune from state taxation unless the state administrator finds an explicit congressional approval of particular state taxes. That is indeed simple, but such an approach cannot be squared with federalism's deference to the State's sovereign power to tax. Moreover, the respondent's theory bypasses the ordinary process of construing Congress's intent regarding immunity.

The amici States suggest a simple alternative: read the statutes Congress passed (here, the Farm Credit Act of 1971, as amended); grant the immunities Congress explicitly provided in the Act; and recognize no immunities beyond what Congress provided in the Act. Of course this does not mean a State can tax a federal agency exercising governmental responsibilities without consent by Congress; but where the entity is a federally-chartered private corporation whose activity consists of participating in a commercial lending market, the statutes must show congressional intent to immunize—either by expression (as in the Farm Credit Act), or, in a proper case, by a clear statutory implication. This approach respects the paramount role of Congress in determining the proper degree of state tax immunity; simplifies the job of ascertaining immunity; and at the same time respects the plenary nature of State taxing power within the federal system. It is an approach consistent with ordinary construction of statutes and with the teachings of this Court concerning pre-emption of state law generally.

Not least, our approach fulfills this Court's dicta that "tax immunity . . . is a permitted consequence of [an entity's] status as a federal instrumentality," but "[a]n instrumentality of the United States can enjoy the benefits and immunities conferred by explicit statutes . . . without the further inference that the instrumentality has all of the rights and privileges of the National Government." *Arkansas v. Farm Credit Servs. of Central Arkansas*, 520 U.S. 821, 829 (1997). Because it ignores these precepts, the decision of the Missouri Supreme Court should be reversed.

SUMMARY OF ARGUMENT

1. The bedrock principle of intergovernmental immunity is that "a State may not, consistent with the Supremacy Clause, [ ] lay a tax 'directly upon the United States'." *United States v. New Mexico*, 455 U.S. 720, 733 (1982) (internal cite omitted). But that principle by its terms controls only where the entity to be taxed can be said to be the United States itself, or its alter ego agencies. The Court's case law shows two circumstances that have justified an automatic, judicial presumption of state tax immunity for a "federal instrumentality": federal government ownership, in which case taxing corporate property, transactions and income is *pro tanto* taxation of the United States itself; and the exercise of federal governmental functions, which raises the inference that state taxation would interfere with congressional purposes in chartering the instrumentality. But where a federally-chartered corporation such as the NBC is privately owned and engages in commercial lending as opposed to issuing the Nation's currency or acting as fiscal agent of the United States, the more applicable principle should be that "a tax not directly laid on the Federal Government ... is valid if nondiscriminatory ... or until Congress declares otherwise." *United States v. County of Fresno*, 429 U.S. 452, 460 (1977).

The respondent and the Missouri Supreme Court predicate their contrary view upon the teachings of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)—specifically, the doctrine that "federal

instrumentalities" should be constitutionally immune from state taxation absent an express consent by Congress. But that argument is mistaken for two reasons. First, *McCulloch* presents the case of the Second Bank of the United States, an entity in which the United States held 20% of the stock, whose directors consisted in part of Presidential appointees (5 of 25), and which exercised currency functions of a governmental nature. By contrast, the NBC is a privately owned entity engaging in commercial activity, with the result that the NBC simply cannot be said to embody "governmental action . . . carried on by the United States" that would justify "inherent freedom" from state taxation. *See, Mayo v. United States*, 319 U.S. 441, 448 (1943). Instead, the NBC stands firmly among those "instrumentalities" whose "subjection to local taxation or regulation is to be interpreted in the setting of the applicable legislation and the particular exaction," *id.*, at 447-48.

Second, the designation "federal instrumentality" is not dispositive of immune status, since it can mean an entity that is owned by the Government and/or exercises core governmental powers, as in *McCulloch*; or it may simply mean an entity that Congress has the power to immunize by statute if it chooses to do so. The latter is precisely the way Congress used the term in 12 U.S.C. 2134.

Two additional distinctions render *McCulloch*'s teachings inapplicable here. First, the tax in *McCulloch* discriminated against the federal entity because state-chartered banks and branches were not subject to the tax at issue. Here by contrast, Missouri

proposes to impose a general income tax on the NBC. Second, *McCulloch* addressed a situation where Congress made no provision concerning immunity one way or another. Here Congress, throughout the Farm Credit Act of 1971, as amended, exhaustively addressed state tax immunity and specified which institutions enjoy what degree of immunity.

Under all these circumstances, the rule that Congress must expressly consent to state taxation simply does not apply to the NBC.

2. Congress addressed the subject of state tax immunity throughout the Farm Credit Act, declaring specific immunities for specific institutions. It granted limited immunity for the obligations and debentures of banks for cooperatives at 12 U.S.C. 2134, which applies here. That should be dispositive: Congress conferred no state income tax immunity. As the Court has stated in the context of production credit associations, a Farm Credit lender's "tax immunity ... is a permitted consequence of its status as a federal instrumentality," but that status means the NBC "can enjoy the benefits and immunities conferred by explicit statutes, however, without the further inference that the instrumentality has all the rights and powers of the National Government." *Arkansas v. Farm Credit Servs. of Central Arkansas*, 520 U.S. 821, 829 (1997); *accord Jefferson County, Alabama v. Acker*, 119 S.Ct. 2069, 2077 (1999) (recognizing that "the area [of intergovernmental tax immunity] is one over which Congress is the principal superintendent").

Further support for limiting immunity to the express statutory grant comes from the Court's forceful application of *expressio unius* in the related context of pre-emption. *See Cipollone v. Ligget Group, Inc.*, 505 U.S. 504 , 517 (1992). Section 2134 immunizes only the NBC's obligations and debentures, and hence does not immunize the entity itself, or its income, property and transactions. More broadly, the method Congress adopted of explicitly detailing the immunities granted in the Farm Credit Act to various entities chartered within the Farm Credit System means that no immunities should be recognized apart from express statutory authorization of such immunity.

3. Principles of federalism lend additional strength to the primacy of the statutory grants of immunity. In construing a federal statute restricting State taxing powers, the Court has held that "[w]hen determining the breadth of a federal statute that impinges upon or pre-empts the States' traditional powers, we are hesitant to extend the statute beyond its evident scope." *Dep't of Revenue v. ACF Industries, Inc.*, 510 U.S. 332 (1994). Absent a clear and plain statement of Congress's intent to preempt State income taxes, the statutes should not be construed to permit such an immunity.

ARGUMENT

A. A State needs no consent from Congress to impose nondiscriminatory taxes on the property, transactions and income of a federally chartered, but privately owned commercial lending business.

At its foundation, the doctrine of intergovernmental tax immunity states that "a State may not, consistent with the Supremacy Clause [ ] lay a tax 'directly upon the United States'." *United States v. New Mexico*, 455 U.S. 720, 733 (1982). No one in this case contends otherwise, nor do the *amici* States doubt that Congress must expressly consent to any "tax [laid] directly upon the United States." But that does not mean that taxing a corporate entity that is completely under private ownership and that engages in lending activity for the commercial benefit of its private owners somehow constitutes a tax laid "directly on the United States," based solely upon the circumstance that it is chartered under federal (as opposed to state) law; or upon the fact that it is designated a "federal instrumentality" for some purposes. Indeed, the fact of private ownership makes it far more appropriate to invoke the converse principle: the doctrine that "a tax not directly laid on the Federal Government . . . is valid if nondiscriminatory . . . or until Congress declares otherwise. . .." *United States v. County of Fresno*, 429 U.S. 452, 460 (1977). That is especially true where the entity's function, as here, involves commercial

lending and not issuing the Nation's currency, or acting as a fiscal agent of the Federal Government.

Viewed under these bipolar principles, the property, transactions and income of the NBC constitute the private citizen's property interests rather than the interest of the Federal Government itself. *Fresno*, 429 U.S. at 456-57. In *Fresno*, the Court distinguished between taxing the possessory interest owned by a private party and taxing the Government's ownership interest as lessor—the Court held the private possessory interest could be taxed. From that standpoint, the present case is an *a fortiori* one: here private parties hold all ownership interests, while the Government is involved as the sovereign that chartered and regulated the corporation. Even less reason presents itself to confer automatic, per se immunity under these circumstances. *Accord Jefferson County, Alabama v. Acker*, 119 S.Ct. 2069, 2077 (1999) (intergovernmental tax immunity "closely confined ... to ba[r] only those taxes that [are] imposed directly on one sovereign by the other or that discriminat[e] against a sovereign or those with whom it deal[s]"), citing *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 811 (1989); *see Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 480 (1939) (state tax approved where "[i]t is measured by income which becomes the property of the taxpayer when received as compensation for his services").

The Missouri Supreme Court predicated its contrary opinion upon its mistaken reading of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Specifically, the state court cited *McCulloch* (along

with some later cases) for the proposition that "the Supremacy Clause of the United States Constitution accords federal instrumentalities immunity from state taxation," and that "Congress can waive this immunity, but only if it expressly consents to state taxation." Pet. App. A-2. But *McCulloch* does not control here for two main reasons. First, the Second Bank of the United States differs materially from the NBC; second, the designation "federal instrumentality" does not by itself imply automatic state tax immunity.[1]

To be sure, *McCulloch* did specifically address the state tax immunity of a federally chartered bank, but there the similarities end and the material differences begin. In *McCulloch*, the United States Government owned 20% of the stock of the Second Bank of the United States, and the President accordingly appointed five of the 25 directors of the corporation. *First Agricultural Nat'l Bank v. State Tax Comm'n*, 392 U.S. 339, 355 (1968) (opinion of Marshall, J., dissenting). The bank also exercised currency functions on behalf of the Government by issuing legal tender and serving as federal fiscal agent. *Id.* Thus, *McCulloch* exemplifies two circumstances justifying automatic, judicially created immunity: substantial federal ownership; and exercise of federal governmental functions.

---

[1] The other cases the Missouri Supreme Court cites are equally unconducive to its conclusion for the reasons set forth in our previous brief. *See* Brief of *Amicus* Ohio *et al.* (supporting petition for certiorari) at 13-15.

In both respects, the Second Bank of the United States contrasts sharply with the NBC. First, the NBC was privately owned, as were its predecessor "banks for cooperatives"—as were the production credit associations in *Arkansas v. Farm Credit Servs. of Central Arkansas*, 520 U.S. 821, 831 (1997). *See,* J. Kayl, Note, "Farm Credit Amendments Act of 1985: Congressional Intent, FCA Implementation, and Courts' Interpretation (and the Effect of Subsequent Legislation on the 1985 Act)," 37 Drake L. Rev. 271, 275 (1987-88). Second, the business of the banks for cooperatives, again like that of the production credit associations, was "making commercial loans," so that "[t]heir interests are not coterminous with those of the Government any more than most commercial interests." 520 U.S. at 831. Accordingly, the NBC simply cannot be said to embody "governmental action . . . carried on by the United States" that would justify "inherent freedom" from state taxation, *Mayo v. United States*, 319 U.S. 441, 448 (1943), but instead stands firmly among those "instrumentalities" whose "subjection to local taxation or regulation is to be interpreted in the setting of the applicable legislation and the particular exaction," *id.*, at 447-48.

It is true that, even apart from federal ownership of a bank, the Court has pronounced that the States had no power to tax the national banks inasmuch as the national banks were instrumentalities of the United States. *Owensboro Nat'l Bank v. Owensboro*, 173 U.S. 664, 668 (1898). But the Court apparently relied on a pre-emption analysis that state taxation would presumptively "either frustrate [ ] the

purpose of the national legislation or impair [ ] the efficiency of these agencies of the Federal government to discharge the duties for the performance of which they were created," *id,* citing *Davis v. Elmira Savings Bank*, 161 U.S. 275, 283 (1896); *see also First Agricultural Nat'l Bank*, 392 U.S. at 355-57 (opinion of Marshall, J., dissenting) (noting original functions of national banks to issue currency and act as fiscal agents of the Federal Government). Thus, the national banks exercised federal governmental functions with which state taxation might presumptively interfere.

As noted below, current pre-emption law calls for deference to Congress's own determination of the scope of pre-emption, with the result that the limited immunity conferred by 12 U.S.C. 2134 should be applied in accordance with its terms, and no additional immunity exists. In any event, the banks for cooperatives, like the production credit associations, do not resemble the early national banks because they engage in the "business [of] making commercial loans," so the grounds for judicially implied pre-emption in *Owensboro* are absent here.[2]

---

[2] As *Owensboro* notes, Congress quickly passed an immunity statute for national banks that specifically consented to certain taxes. 173 U.S. at 668. By the time *First Agricultural Nat'l Bank* was decided in 1968, the Court relied upon the statute and its history rather than on a doctrine of automatic immunity for instrumentalities. 392 U.S. at 346 ("Because of §548 and its legislative history, we are convinced that if a change is to be made in state taxation of national banks, it must come from the Congress, which has

The second main reason *McCulloch* does not control is that the mere designation "federal instrumentality" does not by itself imply automatic state tax immunity. In the context of the Farm Credit System, the Court has stated that "tax immunity . . . is a permitted consequence of [an entity's] status as a federal instrumentality," but "[a]n instrumentality of the United States can enjoy the benefits and immunities conferred by explicit statutes . . . without the further inference that the instrumentality has all of the rights and privileges of the National Government." *Arkansas v. Farm Credit Servs. of Central Arkansas*, 520 U.S. 821, 829 (1997). Earlier, the Court had described the status of a Farm Credit System entity (a federal land bank) as an "instrumentality" that "Congress has the power to protect" by prescribing immunity through the statutes, *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 102 (1941). That is precisely the way Congress used the term in 12 U.S.C. 2134.

The Court's prior cases addressing Farm Credit System bank immunity concerned the immunity of federal land banks, and the Court properly focused on the statutorily granted immunity because where "an

---

established the present limits."). In recent times, Congress routinely addresses state tax immunity by statute, *e.g.*, 12 U.S.C. 531 (Federal Reserve Banks immune); 12 U.S.C. 1768 (federal credit unions immune). This obviates the need for the Court to set precise contours for judicially created immunity.

express immunity has been conferred, there is no need to consider whether the doctrine of implied immunity applies." *Federal Land Bank v. Board of County Commissioners*, 368 U.S. 146, 156 (1961). Nor does the Court's 1941 insistence that the federal land banks' lending function was "governmental" change the analysis. *Bismarck Lumber*, 314 U.S. at 102. First, the context for that statement was the Depression period which saw increased Government investment and ownership of the land banks. *See Federal Land Bank v. Priddy*, 295 U.S. 229, 232, n.1, 2 (1935) (noting resurgence of Government ownership in the wake of 1932 legislation). Second, the Court more recently pronounced that the commercial lending business of production credit associations involved "interests that are not coterminous with those of the Government any more than most commercial interests." *Arkansas*, 520 U.S. at 831.

Moreover, in asserting its alleged immunity as an "instrumentality," the fact the NBC is a privately owned commercial business is significant, because the state tax immunity it claims is a sovereign interest of the United States itself, which is most appropriately claimed by the National Government. The Court has cautioned that "where [state tax] immunity is invoked by the private citizen it tends to operate for his benefit at the expense of the taxing government and without corresponding benefit to the government in whose name the immunity is claimed." *Graves*, 306 U.S. at 483. Indeed, in *Arkansas v. Farm Credit Servs. of Central Arkansas*, No. 95-1918, the United States disclaimed the state tax immunity asserted by the

production credit associations, another privately held commercial lender within the Farm Credit System.

Two additional differences make *McCulloch* inapposite. First, the Maryland tax in *McCulloch* applied only to banks or branches establishing offices in the state "without authority from the state first had and obtained." 17 U.S. (4 Wheat.) at 320-321. In other words, Maryland-chartered banks did not pay, and the tax was therefore discriminatory. This Court has explained the significance of the nondiscrimination principle in terms of its providing a "political check . . . when a state tax falls on a significant group of state citizens who can be counted upon to use their votes to keep the State from raising the tax excessively, and thus placing an unfair burden on the Federal Government." *Washington v. United States*, 460 U.S. 536, 545 (1983). In the arena of State immunities from federal taxation the Court has gone so far as to call the "nondiscrimination principle" the "heart of modern intergovernmental tax immunity case law." *South Carolina v. Baker*, 485 U.S. 505, 525 n.15 (1988).

Second, Congress had not addressed the subject of state tax immunity in *McCulloch*, but by contrast the Farm Credit Act repeatedly addresses immunity and indeed supplied limited immunity to banks for cooperatives at 12 U.S.C. 2134. Where Congress speaks, its word should be heeded and should control.

B. Because Congress systematically addressed the scope of state tax immunity in the Farm Credit Act, no non-statutory doctrine of immunity applies.

1. *Expressio unius* defeats the NBC's immunity claim.

At 12 U.S.C. 2134, Congress specifically addressed the state-tax immunity of banks for cooperatives. Applying ordinary rules of construction, including most prominently the doctrine *expressio unius est exclusio alterius*, Congress should be understood to have intended that banks for cooperatives enjoy only the immunities it expressly granted—and more than that: Congress intended banks for cooperatives to have no immunities beyond those expressly granted. That affirmative intent of Congress should control, because "the area [of intergovernmental tax immunity] is one over which Congress is the principal superintendent," *Acker*, 119 S.Ct. at 2077-78 (1999); and because "[w]ise and flexible adjustment of intergovernmental tax immunity calls for political and economic considerations of the greatest difficulty and delicacy" so that such problems "are ones which Congress is best qualified to resolve," *United States v. Detroit*, 355 U.S. 466, 474 (1958). *Accord Rockford Life Ins. Co. v. Illinois Dep't of Revenue*, 482 U.S. 182, 191 (1987) ("[O]ur job is neither to assess the underlying merits of the program, nor to opine on whether Congress would be wise to exempt Ginnie Maes from state taxation . . .. A court must proceed carefully when asked to recognize an

exemption from state taxation that Congress has not clearly established."); *Smith v. Davis*, 323 U.S. 111, 119 (1944) ("All of these related statutes are a clear indication of an intent to immunize from state taxation only the interest-bearing obligations of the United States which are needed to secure credit to carry on the necessary functions of the government. That intent . . . should not be expanded upon or modified in any degree by the judiciary."); *Intel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 75-76 (1993); *Wardair Canada, Inc. v Florida Dep't of Revenue*, 477 U.S. 1, 11-13 (1986).

This reasoning derives additional force from the context: a claim that the Supremacy Clause precludes the ordinary, nondiscriminatory operation of state tax law with respect to a federally chartered entity. In another Supremacy Clause context, that of pre-emption, the Court has clarified that an express pre-emption statute should ordinarily control the scope of pre-emption. In *Cipollone v. Ligget Group, Inc.*, 505 U.S. 504 (1992), the Court considered the extent to which federal laws that require warnings on cigarette labels pre-empted state law causes of action based on failure to fully disclose the dangers of smoking. The Court of Appeals had found that the pre-emption provision in the acts did not preclude the state damage actions, but proceeded to engage in an "implied pre-emption" analysis, concluding that state claims were precluded. This Court reversed in part, holding the appellate court erred by judicially re-determining the potential conflicts between state and federal laws. This was error, because Congress's pre-emption

provision showed that Congress had already determined and decided the question:

> In our opinion, the pre-emptive scope of the 1965 Act and the 1969 Act is governed entirely by the express language in §5 of each Act. When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a 'reliable indicium of congressional intent with respect to state authority,' 'there is no need to infer congressional intent to pre-empt state laws from the substantive provisions' of the legislation. Such reasoning is a variant of the familiar principle of expressio unius est exclusio alterius: Congress's enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.

505 U.S. at 517 (internal cites omitted). This rationale is equally compelling in determining the scope of tax immunity here, and it precludes inferring any intent of Congress to confer income tax immunity on the NBC. As the preceding section of this brief shows, no extra-statutory reason justifies such immunity either. *See, Freightliner Corp. v. Myrick*, 514 U.S. 280, 288-89 (1995).

In opposing certiorari in this case, the respondent has argued that the 1985 amendments to 12 U.S.C. 2134 somehow evinced a legislative intent to

"no longer authorize[ ] state taxation of the banks for cooperatives." Brief in Opposition at 5-6. Section 2134 furnishes a decidedly odd context for such an argument, given that the 1985 amendment deleted a broad immunity that had previously existed when the government owned shares, and left in place only a limited immunity of obligations and debentures. The NBC's submission would render nugatory Congress's careful drafting of a limited immunity provision. That suggested construction is wrong as a matter of the statutory language and legislative history of 12 U.S.C. 2134, as the petitioner's brief shows in greater detail.

But it is also wrong for a larger reason. The Farm Credit Act of 1971, as amended (the "Act"), constitutes the enabling legislation for chartering and regulation of Farm Credit System entities. Of particular importance are the comprehensive amendments of the Act in the Agricultural Credit Act of 1987, which strongly promoted mergers of entities within the System, *see* 12 U.S.C. 2279a *et seq.*, and in particular the merger of various banks for cooperatives into one National Bank for Cooperatives, Agricultural Credit Act of 1987, P. L. 100-233, 101 Stat. 1639, §413 (1988). The Act systematically addresses state tax immunity by detailing which entities are free of which taxes. *E.g.*, 12 U.S.C. 2023 (broad immunity, including exemption of the banks and the "capital, reserves, and surplus thereof, and the income derived therefrom," for Farm Credit Banks created out of merger of former Federal Land Banks with former Federal Intermediate Credit Banks); 12 U.S.C. 2098 (broad immunity for federal land bank associations); 12 U.S.C. 2077 (narrow immunity for production credit associations).

"It is presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338, (1994), citing *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (holding in part that inclusion of "generating waste" language in other portions of environmental act indicated that its omission from exemption section meant facility engaged in generating waste was not within exemption) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."); *Rodriguez v. United States*, 480 U.S. 522, 525 (1987) (per curiam) (holding that section of crime act did not impliedly deprive judge of statutory discretion where language in other sections in the same act did so explicitly).

Thus, where Congress intended broad immunity, including such immunities as are claimed in this case, it crafted language that explicitly conferred such immunity, 12 U.S.C. 2023, 12 U.S.C. 2098. Under the reasoning of *Environmental Defense Fund*, *Keene Corp.*, and *Rodriguez*, Congress must be presumed to have acted intentionally and purposely both by not including broad immunity language in Section 2134, and by expressly conferring a lesser immunity on banks for cooperatives. In short, the laws Congress wrote compel the inference that Congress affirmatively intended that banks for cooperatives not enjoy broad immunity of its property, transactions and income.

2. Because Congress adopted the method of explicitly specifying immunities in the Farm Credit Act, no immunities should be recognized under the Act except those explicitly authorized by statute.

The foregoing discussion clarifies that state tax immunity *vel non* needs to be decided as a matter of Congress's intent under the Act. But that is not the whole story. Congressional intent can be discerned either through reading an express grant of immunity or, in a proper case, through a statutory implication of immunity. With the Farm Credit System, however, Congress chose the method of detailing which institutions should be immune from which taxes, and consequently, claims of implied immunity simply cannot be squared with the Act.

The prime example for an implied grant of immunity by Congress comes from the national banks, where Congress passed a statute expressly consenting to particular types of taxes. By implication, those taxes Congress did not expressly allow were intended to be precluded. That is the gravamen of the majority opinion in *First Agricultural National Bank*, *supra*.

As previously noted, the Court in the 1899 *Owensboro* decision had pronounced national banks immune on general pre-emption principles in the first instance, even apart from Congress's explicit statute addressing state taxation of those banks. In 1968, the Court confronted the argument that the nature of the

national banks' activity had so changed that state tax immunity was unwarranted. Specifically, the State argued that through the Federal Reserve Act of 1913 and later developments, the Federal Reserve System displaced the former function of the national banks in issuing currency and serving as fiscal agents of the Federal Government. *See* 392 U.S. at 356-57 (opinion of Marshall, J., dissenting).

In the face of this contention, the Court preserved broad immunity for the national banks, but in doing so the Court found it "unnecessary to reach the constitutional question of whether today national banks should be considered nontaxable as federal instrumentalities." 392 U.S. at 341. Instead, the Court relied on "pertinent congressional legislation in the banking field." *Id*. Specifically, the Court cited the statute consenting to particular categories of state taxation, reviewed the congressional debates underlying that legislation, and held the Congress reached a "compromise which permitted state taxation of national banks in certain ways, but prohibited all other forms of state taxation." 392 U.S. at 343. The Court declined to "change what legislative history and prior decisions have established is the precise meaning of an Act of Congress." 392 U.S. at 345. Thus, the Court decided the national bank immunity question solely as a matter of construing Congress's intent from statutes and history, and concluded that taxes not expressly permitted were impliedly precluded.

By stark contrast, Congress throughout the history of the Farm Credit System has specifically and expressly stated what degree of immunity should be

enjoyed by which institutions. That was so in the Federal Farm Loan Act of 1916, 64th Cong., 1st Sess., ch. 245, §26, 39 Stat. 360, 380 (1916), which originally authorized and immunized the federal land banks; and also in the Farm Credit Act of 1933, 72nd Cong., 2nd Sess., ch. 98, §63, 48 Stat. 257, 267 (1933), authorizing and immunizing the production credit associations and banks for cooperatives. When Congress amalgamated prior Farm Credit System legislation in the Farm Credit Act of 1971, Pub.L. No. 92-181, §§ 2.17, 3.13, 85 Stat. 583, 602, 608 (1971), the same approach prevailed. When Congress chose to authorize "service corporation" subsidiaries for Farm Credit System entities in 1980, it crafted a pass-through provision that specifically referenced tax immunities, 12 U.S.C. 2214, Farm Credit Act Amendments of 1980, Pub. L. 96-592, § 404, 94 Stat. 3437, 3447-48 (1980). Because of this method of granting immunity through express provision, state tax administrators are justified both in recognizing those immunities expressly granted and denying any claim of immunity not founded upon an explicit authorization of immunity in the statute.

That means the NBC's immunity claim here must fail. Elsewhere in the Farm Credit System, this reasoning becomes significant for claims of immunity by entities that arose from certain other mergers consummated in the wake of the Agricultural Credit Act of 1987's amendments to the Farm Credit Act. The 1987 Act encouraged and authorized not only the merger of former banks for cooperatives into the National Bank for Cooperatives, but also mergers of "unlike associations," 12 U.S.C. 2279c-1, which

themselves each had statutes conferring differing degrees of immunity.

The example for this in the existing case law is the "agricultural credit associations" ("ACAs"). ACAs result from merger of federal land bank associations, which enjoyed broad immunity at 12 U.S.C. 2098, and production credit associations, which enjoyed a limited immunity statute like the NBCs, 12 U.S.C. 2077. Immunity status after merger was addressed by the Indiana Tax Court in 1997 (*Farm Credit Servs. of Mid-America v. Dep't of State Revenue*, 677 N.E.2d 645 (Ind. Tax 1997), and again in 1999 (*Farm Credit Servs. of Mid-America v. Dep't of State Revenue*, 705 N.E.2d 1089 (Ind. Tax 1999).) Contrary to that Indiana court's theory, however, Congress's pattern of expressly granting specific degrees of immunity to specific entities indicates Congress intended no immunity for the new entity, the ACA, once the merger was complete. Nor is that construction anything but consistent with the overall intent to privatize the Farm Credit System and, through mergers, to make its entities viable private players in the agricultural lending market.[3]

---

[3] It is worth noting that, after the tax years at issue in this case, the NBC merged with the former Farm Credit Bank of Springfield. The farm credit banks, in turn, resulted from merger of federal land banks and district federal intermediate credit banks, and the successor entities were accorded broad state tax immunity at 12 U.S.C. 2023. Thus, CoBank as it exists today, after the period at issue, parallels the situation with the ACAs: entities with different degrees of statutorily prescribed immunity merged and formed an entity that can point to no provision explicitly granting it immunity.

As if to make its silence even more significant, Congress in the Agricultural Credit Technical Corrections Act of 1988, Pub. L. 100-399, 102 Stat. 989, 1003 (1988), added 12 U.S.C. 2279g—a provision that expressly exempts merger transactions themselves from certain taxes and prevents States from reassessing upward the value of corporate property based upon occurrence of the merger. Absent once more is any mention of an immunity for the entities after the merger.

Of course the immunity *vel non* of Farm Credit System entities other than the NBC is not before the Court, and cannot be properly decided here. But in resolving this case it would be proper for the Court to admonish that the immunity of Farm Credit System entities generally should rest upon determination of Congress's intent in the Farm Credit Act, and not upon reference to any extra-statutory doctrine of immunity. The need for such admonition is evidenced not only by the decision below, and by the Indiana Tax Court rulings regarding the agricultural credit associations, but also by state court rulings concerning the immune status of production credit associations. *See Farm Credit Servs. of Central Arkansas v. Arkansas*, 994 S.W.2d 453 (Ark. 1999), *cert. denied sub nom., Arkansas v. Farm Credit Servs. of Central Arkansas*, No. 99-993, 68 U.S.L.W. 3613, 120 S.Ct. 1530 (Mar. 27, 2000); *Northwest Lousiana PCA v. State of La. Dep't of*

Revenue and Taxation, 746 So.2d 280 (La. App. 1999); *In re: Appeal of Farm Credit Servs. of Central Kansas et al.*, Nos. 1998-2839-DT et al., 1999 Kan. Tax LEXIS 78 (Oct. 25, 1999); *CoBank ACB v. Fisher*, No. 99CV437 (Colo. Dist. Ct. June 15, 2000), *but see PCA of Eastern N.M. v. Taxation and Revenue Dep't*, No. 20,078, 2000 N.M. App. LEXIS 8 (Feb. 1, 2000), *review denied*, 997 P.2d 820 (N.M., Mar. 13, 2000), *cert. petition docketed* July 28, 2000 (No. 00-156); *In re Farm Credit Servs. of Western New York ACA*, Nos. 816576, 816604, 816605, 816606, 2000 N.Y. Tax LEXIS 7 (Jan 13, 2000).

C. Principles of federalism call for a "clear statement" of Congress's intent to grant immunity.

In *Dep't of Revenue v. ACF Industries, Inc.*, 510 U.S. 332 (1994), the Court decided that the restrictions on state taxing power enacted as part of the Railroad Revitalization and Regulatory Reform Act of 1976 (the "4-R Act"), which on their face prohibited discriminatory property tax rates, did not erase the State's discretion to exempt various classes of non-railroad property from its generally applicable *ad valorem* property tax. After analyzing the statutes, the Court observed:

> Principles of federalism support, in fact mandate, our view. Subsection (b)(4), like the whole of §11503 [49 U.S.C. 11501], sets limits upon the taxation authority of state government, an authority we have recognized as central to state sovereignty.

> When determining the breadth of a federal statute that impinges upon or pre-empts the States' traditional powers, we are hesitant to extend the statute beyond its evident scope.

510 U.S. at 345 (internal cites omitted). This doctrine applies not only to taxation, but to every fundamental sovereign power of the States, and has led the Court to formulate a "clear statement" or "plain statement" rule, *see Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) ("plain statement rule" means that "[i]f Congress intends to alter the usual constitutional balance between the states and the Federal government," it must make its intention to do so "unmistakably clear in the language of the statute"[internal cites omitted]). The Court has called the power to tax "the most basic power" of State government, *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940); congressional interference with it cannot be lightly implied, but must be clearly expressed in the statute.

Because no provision of the Act—and certainly not 12 U.S.C. 2134—makes any plain statement that the NBC should be exempted from nondiscriminatory state income taxes, no such immunity should be recognized.

CONCLUSION

For all of the foregoing reasons, the decision of the Supreme Court of Missouri should be reversed.

Respectfully submitted,

BETTY D. MONTGOMERY
Attorney General of Ohio
EDWARD B. FOLEY
State Solicitor
ROBERT C. MAIER*
*Counsel of Record for *Amici*
Assistant Solicitor
30 East Broad Street, 17th Floor
Columbus, Ohio 43215-3428
(614) 466-8980

August 24, 2000.